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CLOSURE OF MILITARY INSTALLATIONS – THE GOOD, THE BAD, THE
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By
Sandra May Wozniak

B.A., May 1985 (magna cum laude), State University of New York at Buffalo
J.D., May 1988, State University of New York at Buffalo

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Thesis directed by
Laurent Romain Hourcle
Associate Professor of Environmental Law

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CLOSURE OF MILITARY INSTALLATIONS – THE GOOD, THE BAD, THE BETTER?

I. Introduction.

Closures or realignments of military installations have occurred throughout the course of American military history, with some interruption. In the wake of the end of the Cold War, both the Armed Forces and Congress have moved to downsize military personnel and infrastructure; either to recreate America's isolationism from world affairs or to reduce defense costs in order to reap a peace dividend.

From the earliest legislative act governing base realignments and closures to the present law, this paper will discuss the evolution of Section 2687 of Title 10, United States Code. Originally implemented in 1977, the statute became the subject of subsequent criticism. Congressional and public cries for more oversight, apolitical decisionmaking, and more objective criteria and processes heralded subsequent legislative changes.¹ Accordingly, this paper will also discuss the Base Realignment and Closure Act of 1988, and the Defense Realignment and Closure Act of 1990. The reader will follow the realignment and closure selection process from its beginnings in the Department of Defense (hereinafter DOD), through Congressional review, to the White House. Discussion will also include the development of the critical and highly scrutinized selection criteria, the enactment of an independent commission, and the involvement of public review to the process.

¹ Other changes arose from the cries for oversight, a more independent process, and lessons learned of previous base realignments and closures and the ever-increasing arena of environmental regulations.

After the identification and approval of bases for realignment and closure, the reader is then introduced to the planning process at those installations slated for realignment or closure. Key organizations and players in the post-realignment and closure process are identified and their roles explored. Their interactions and related co-dependency are also discussed.

Two major planning documents, the local redevelopment plan and the environmental impact analysis, are also examined before specific personal and real property transfer mechanisms available at realigned or closed bases are discussed.

After exploring the selection and planning process at realigned and closed bases, the reader's attention is shifted to the environmental implications of base realignments and closures. The Comprehensive Environmental Response and Compensation Liability Act (hereinafter CERCLA), the Superfund Amendments and Reauthorization Act of 1986, (hereinafter SARA) and subsequent amendments providing for early transfer of contaminated property are discussed, with special emphasis on their interface with property transfers at realigned and closed bases.

Mechanisms used to protect human health and the environment in the transfer of contaminated property are also discussed and then the reader is guided through the successful early deed transfers at three Air Force installations and ongoing negotiations at a fourth Air Force installation.

The paper ends with a discussion and analysis of what is good about the process and what can be bettered in the event DOD receives approval for another round of base realignments and closures.

As a caveat, this paper will limit its focus to the Air Force's process. Because all military departments have implemented their own different regulations and procedures to comply with federal law for realigned or closed installations discussion of each would be too extensive for this medium.

II. Legislative and Statutory Changes.

Closures of military installations in the early 1960s and 1970s were handled quite differently than the present day. The Department of Defense (hereinafter DOD) chose the bases targeted for closure and oversaw the conversion of those bases from military to civilian use.² During that period, congressional or community comment was not obtained before the base closings,³ and inevitably conflict arose among and within communities, the political landscape, and the DOD.⁴ Consequently, Congress amended the process to prevent wholesale closures by enacting new legislation in 1977 as part of the Military Construction Authorization Act of 1978.⁵

A. Base Realignments and Closures-1977 (10 United States Code §2687).

In the 1977 law Congress recognized "that decisions on base realinements [sic] are the prerogative of the Chief Executive..., [that] Congress has the responsibility to review base...decisions... [and such] decision[s] must be based on military necessity

² INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION BASE REUSE HANDBOOK, 2 (Seth Kirshenberg, James Connell, et.al. eds. 1997) [hereinafter ICMA BASE REUSE HANDBOOK].

³ *Id.*

⁴ *Id.*

⁵ Base Closures and Realignment, Pub. L. No. 95-82, tit. VI, §612(a), Aug. 1, 1977, 91 Stat. 379 and amended Pub. L. No. 95-356, tit. VIII, §805, Sept. 8, 1978, 92 Stat. 586; Pub. L. No. 97-214, §10(a)(8), July 12, 1982, 96 Stat. 175; Pub. L. No. 98-525, tit. XIV, §1405(41), Oct. 19, 1984, 98 Stat. 2624; Pub. L. No. 99-145, tit. XII, §1202(a), Nov. 8, 1985, 99 Stat. 716; Pub. L. No. 100-180, Div. A, tit. XII, §1231(17), Dec. 4, 1987, 101 Stat. 1161; Pub. L. No. 101-510, Div. B, tit. XXIX, §2911, Nov. 5, 1990, 104 Stat. 1819; Pub. L. No. 104-106, Div. A, tit. XV, §1502 (a)(1), Feb. 10, 1996, 110 Stat. 502 (codified as amended at 10 U.S.C.A. §2687 (1998)).

with due regard for environmental impact.”⁶ Consequently, the new law imposed procedures to give “Congress and the public adequate opportunity to contribute to the decisionmaking process”⁷ after a candidate installation was announced.

Base closures or realignments occurring after September 1977 required the DOD to seek Congressional review of its selections. As originally written, the law, as codified at Section 2687, Title 10, United States Code, required that only larger actions be reviewed.⁸

The new law also described the process by which Congressional approval of the closures list could be obtained. Either the Secretary of Defense or the Secretary of the military department affected notifies the Committee on Armed Services of the Senate and the Committee on National Security of the House of Representatives of the proposed bases for closure or realignment.⁹ In that notification to Congress, the appropriate Secretary must include his or her recommendations and justification for realignments and closures.¹⁰ The request by the appropriate Secretary is made as part of the annual request for authorization of appropriations to those Congressional Committees. Supporting its request, the respective Secretary must include “an evaluation of the fiscal, local economic, budgetary, environmental, strategic, and operational consequences” of the

⁶ S. REP. NO. 95-125, at 5 (1977).

⁷ *Id.* at 5.

⁸ Base Closures and Realignments, Pub. L. No. 95-82, tit. VI, §612(a). Those military installations recommended for closure employing not less than five hundred civilian personnel and those recommended for realignment involving a reduction by more than one thousand, or more than 50 percent the number of civilian personnel were required to be reviewed. *Id.* A subsequent technical amendment in 1978 changed “five hundred” civilian personnel to “three hundred” civilian personnel which remains the current standard. *Id.* at §2687(b)(1). See Pub. L. No. 95-356. See also 10 U.S.C.A. §2687 note. An exception to the process was available if the President certified to Congress that “such closure or realignment must be implemented for reasons of national security or a military emergency.” *Id.* Other technical amendments in 1990 brought space leased by DOD activities into the closure or realignment process for consideration. See 10 U.S.C. §2687(a)(1) (1998).

⁹ *Id.* §2687(b)(1).

¹⁰ Base Closures and Realignments, Pub. L. No. 95-82, §612(a), codified at 10 U.S.C.A. §2687.

proposed closure or realignment.¹¹ While awaiting the Congressional Committees' response, no irrevocable action may be taken by the military to effect or implement the decision for the longer of 30 legislative days or 60 calendar days after notice to those Committees.¹²

The new law also required compliance with the National Environmental Policy Act of 1969 (hereinafter NEPA) for the proposed realignment or closure.¹³

For the decade between 1977 and 1988 no major military bases were closed.¹⁴ However, as the need for closings became more apparent with the subsequent ending of the Cold War, the legislators did not revise new life into Section 2687, but rather drafted and enacted a series of laws governing specific rounds of base closures and realignments. The first of those acts is the Defense Authorization Amendments and Base Closure and Realignment Act that was enacted in 1988.¹⁵

B. Base Realignment and Closure Act—1988 (hereinafter BRAC-88).

BRAC-88 required the Secretary of Defense to include, as part of the annual budget request, a schedule of the closure and realignment actions to be taken for that fiscal year and an estimate of the costs to be incurred and the costs to be saved.¹⁶

¹¹ *Id.* §2687(b)(1).

¹² *Id.* §2687(b)(2). Passage of that time then allows the military department to use available funds to effect the closure or realignment of military installations. *Id.* §2687(d)(1). The statute also provides an exemption from its procedures, if "the President certifies to the Congress that such closure or realignment must be implemented for reasons of national security or a military emergency." *Id.* §2687.

¹³ Base Closures and Realignments, Pub. L. No. 95-82, §612(a). But this requirement was redundant because NEPA analysis was already mandated by existing law. *See* 42 U.S.C. §4321 (1998).

¹⁴ ICMA BASE REUSE HANDBOOK, *supra* note 2, at 2. The author can only speculate that closures or realignments were not requested due to the Iranian Hostage Crisis, the Cold War, and the military arms buildup that occurred during President Ronald Reagan's tenure in the White House.

¹⁵ Base Realignment and Closure Act of 1988, Pub. L. No. 100-526, tit. II, §201, Oct. 24, 1988, 102 Stat. 2623 (codified as amended at 10 U.S.C. §2687 (1998)).

¹⁶ *Id.* §206. It also required the Secretary of Defense to conduct a study on whether bases overseas should be realigned or closed. *Id.* Unlike earlier legislation, BRAC-88 did not identify an employee size limitation to military installations subject to closure or realignment. *Id.* §209.

More importantly, BRAC-88 established the Commission on Base Realignment and Closure (hereinafter Commission) to provide some “neutrality” or oversight to the selection process and to prepare a list of recommended bases for closure or realignment.¹⁷ Implementation of any closures was forestalled until the Secretary of Defense agreed in writing to the Commission’s recommendations.¹⁸ Once agreement was reached the closures and realignments had to be initiated by September 30, 1991 and completed by September 30, 1995.¹⁹

While requiring compliance with the Federal Property and Administrative Services Act of 1949 and the Surplus Property Act of 1944, BRAC-88 expressly authorized the military to dispose of its surplus property.²⁰ In identifying prospective transferees, the military departments were required to give priority to other DOD departments or instrumentalities.²¹ During this process, the military also had to consult with state and local government representatives on proposed reuse plans for the property.²²

Ultimately BRAC-88 resulted in the closure or realignment of five major Air Force installations.²³

¹⁷ *Id.* §203. The Commission consisted of 12 members appointed by the Secretary of Defense. Its members had to certify that they considered all military installations within the U.S. in making their recommendations. *Id.* NEPA continued to apply, but not to the actions of the Commission. *Id.* §204.

¹⁸ *Id.* §202. The DOD had to submit its report to the Committees on Armed Services of the Senate and the House of Representatives. *Id.*

¹⁹ *Id.* §201. The Secretary of Defense’s authority under BRAC-88 expired on October 1, 1995. *Id.* §202.

²⁰ *Id.* §204. The Federal Property and Administrative Services Act of 1949 is codified at 40 U.S.C. §483 and the Surplus Property Act of 1944 is codified at 50 U.S.C.A. §1622, and property disposal authority usually rests with the General Services Administration. *Id.*

²¹ *Id.* §201.

²² *Id.* §201. The remaining provisions discussed legal waivers, funding requirements, and Congressional review. *Id.* §205, §207, and §208.

²³ *Air Force BRAC Bases* (last modified Jul. 6, 1998) <[http:// www.afbca.hq.af.mil/ols/index.htm](http://www.afbca.hq.af.mil/ols/index.htm)>. They were Chanute AFB, Ill., George AFB, Cal., Mather AFB, Cal., Norton AFB, Cal., and Pease AFB, N.H. *Id.*

The DOD prepared an additional base closure list on January 29, 1990, but Congress promptly rejected it.²⁴ Voicing its dissatisfaction with the military's perceived problems in objectively selecting bases for closure, Congress further rejected DOD's proposal to expedite the closure of military bases, finding it defective.²⁵ Congress clearly wanted a fair process that used objective, neutral criteria for identifying bases for closure and realignment. Consequently, Congress insisted in its next base closure legislation that DOD submit a report identifying a force structure plan for the next five years, a closure plan for overseas bases, a legislative proposal containing a closure process for bases within the United States, and a proposal for economic assistance to the communities affected by a base closure.²⁶

C. Defense Base Closure and Realignment Act of 1990, as amended (hereinafter DBCRA-90).²⁷

Passage of the DBCRA-90 resulted in sweeping changes to the base closure and realignment process spurred by the vocal dissatisfaction of communities and Congress to the 1988 round of base closures and realignments.²⁸ The most important change was the establishment of an independent Defense Base Closure and Realignment Commission

²⁴ H.R. REP. NO. 101-665, at 386 (1990). The list was drafted after the end of the closures occurring under BRAC-88. *Id.* The military could not explain how the list was assembled thereby making the list appear arbitrary. *Id.*

²⁵ *Id.* at 383. According to Congress, the proposal failed to provide assurances that "closures would be based on a force structure plan, would be based on objective criteria, would be conducted by a nonpartisan group, or would be determined based on economy and utility...." *Id.*

²⁶ *Id.* at 383. As part of the next budget request covering fiscal year 1992. *Id.* The author believes that the economic hardships experienced by local communities from the closures in BRAC-88 precipitated inclusion of the requirement for economic assistance in any future rounds.

²⁷ DBCRA-90, Pub. L. No. 101-510, tit. XXIX, §2901, Nov. 5, 1990, 104 Stat. 1485 amended by the National Defense Authorization Acts for Fiscal Years 1992/1993 (Pub. L. No. 102-190), 1993 (Pub. L. No. 102-484), 1994 (Pub. L. No. 103-160), 1995 (Pub. L. No. 103-337), 1996 (Pub. L. No. 104-106), and 1997 (Pub. L. No. 104-201), and the Base Closure Community Redevelopment and Homeless Assistance Act of 1994 (Pub. L. No. 103-421) [codified as amended at 10 U.S.C. §2687].

²⁸ Its stated purpose was to provide "a fair process that will result in the timely closure and realignment of military installations inside the United States." *Id.* §2901.

(hereinafter DBCRA-90 Commission) comprised of eight members.²⁹ Those members were appointed by the President after consultation with leaders of Congress and the appointments were subject to the advise and consent of the Senate.³⁰

The DBCRA-90 first required the Secretary of Defense to create "a force-structure plan for the Armed Forces."³¹ The Secretary of Defense also had the affirmative duty to develop and publish in the Federal Register proposed selection criteria for recommending the closure or realignment of military bases.³² After a public comment period of thirty days, the final selection criteria were published in the Federal Register on February 15, 1991.³³

The DOD published eight final selection criteria giving priority consideration to the first four criteria reflecting military value.³⁴ Using those criteria, the list of bases for recommended closure or realignment would be created by DOD and then transmitted to the DBCRA-90 Commission.³⁵

²⁹ *Id.* §2902. The DBCRA-90 Commission and its authority expired on December 31, 1995. *Id.* §2902(l).

³⁰ *Id.* §2902. Meetings by the DBCRA-90 Commission were open to the public, except when classified information was discussed. *Id.* Additionally, the selection process must occur in 1991, 1993, and 1995. *Id.* The selection of non-election years appears to reflect a further attempt to depoliticize the base closure and realignment process, by removing it as an issue in political platforms.

³¹ *Id.* §2903(a). The plan must be based on an assessment of the probable threats to the nation's security for fiscal years 1992, 1994, and 1996 (e.g. a biennial basis). *Id.*

³² *Id.* §2903(b).

³³ *Id.* §2903(b).

³⁴ *DOD Selection Criteria for Closing and Realigning Military Installations Inside the United States*, 56 Fed. Reg. 6374 (Feb. 1991). The eight criteria are; (1) the current and future mission requirements and the impact on operational readiness of DOD's total force; (2) the availability and condition of land, facilities and associated airspace at both the existing and potential receiving locations; (3) the ability to accommodate contingency, mobilization, and future total force requirements at both the existing and potential receiving locations; (4) the cost and manpower implications; (5) the extent and timing of potential costs and savings; (6) the economic impact on communities; (7) the ability of both the existing and potential receiving communities' infrastructure to support forces, missions and personnel; and (8) the environmental impact. *Id.*

³⁵ DBCRA-90, Pub. L. No. 101-510, §2903(c). A summary report of the selection process and justification for each recommended base closure or realignment also had to accompany the list. The Secretary of Defense was required to consider all military installations within the United States "equally without regard to whether the installation has been previously considered or proposed for closure or realignment...." *Id.* The Secretary of Defense submitted his report under the DBCRA-90 on April 15, 1991. *DOD*

The DBCRA-90 Commission reviewed the Secretary of Defense's recommendations and conducted public hearings.³⁶ Within approximately five months from receiving the report, the DBCRA-90 Commission had to transmit to the President its report containing its findings, conclusions, and recommendations for closures and realignments.³⁷ The DBCRA-90 also authorized the DBCRA-90 Commission to change the Secretary of Defense's recommendations if it determined that the "Secretary deviated substantially from the force-structure plan and final criteria."³⁸

No later than July 15 of each year in which recommendations were made, the President had to transmit a report containing his approval or disapproval of the list to the DBCRA-90 Commission and to Congress.³⁹ Failure by the President to approve and certify the list by September 1 of that year terminated the process for that year.⁴⁰

Recommended Base Closures and Realignments, 56 Fed. Reg. 15184 (1991). The summary of the Department of the Air Force's selection process described the incorporation of the eight final criteria and approximately eighty sub-elements developed by the Air Force to provide specific data points for each criterion. *Id.* at 15240. The specific sub-elements and weighting factors were not publicly disclosed. *Id.* at 15240. Following the summary of the selection process was an installation-by-installation discourse on the justification for that base's recommendation for closure or realignment.³⁵ *DOD Recommended Base Closures and Realignments*, *supra* at 15242.

³⁶ DBCRA-1990, Pub. L. No. 101-510, §2903(d)(1).

³⁷ *Id.* §2903(d)(2)(A).

³⁸ *Id.* §2903(d)(2)(B). However, the DBCRA-90 Commission had to justify any deviations or recommendations in its report to the President. *Id.* §2903(d)(3). On its face, "deviated substantially" appears to be a relatively high standard, however, in practice, the application of that standard has been regularly used, as for example, the Air Force's recommendation to close Brooks AFB, Tex. was overturned by the DBCRA-90 Commission. THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION, 1995 REPORT TO THE PRESIDENT, 1-108. In its report to the President, the DBCRA-90 Commission stated "the Secretary of Defense deviated substantially from final criteria 1, [e.g. current and future mission requirements and the impact on DOD's operational readiness], 4 [e.g. cost and manpower implications], and 5 [e.g. the extent and timing of potential costs and savings]." *Id.* at 1-108. The Air Force justified the closure based on excess laboratory capacity, whereas the DBCRA-90 Commission focused on the costs of closure to DOD. *Id.* at 1-107.

³⁹ *Id.* §2903(e)(1). If the President disapproved the recommendations, in whole or in part, he was required to describe his reasons to the DBCRA-90 Commission and to Congress. *Id.* §2903(e)(3). The DBCRA-90 Commission, in turn, then had an opportunity to submit a revised list of military installations for closure or realignment. *Id.* §2903(e)(3). The President could then certify his approval of the corrected list of recommendations. *Id.* §2903(e)(4).

⁴⁰ *Id.* §2903 (e)(5).

The DBCRA-90 also required compliance with the Federal Property and Administrative Services Act of 1949, and the Surplus Property Act of 1944, but authorized the military to dispose of surplus property without going through the General Services Administration.⁴¹

Mirroring earlier law, DBCRA-90 required NEPA compliance, except for those actions of the President, the DBCRA-90 Commission, and the DOD in determining the closing or realigning of the military installation.⁴² The statute also addressed environmental compliance concerns that are discussed in section IV of this paper.

DBCRA-90 authorized three rounds of closure.⁴³ All bases identified in 1991 for realignment or closure had to be completed by July 10, 1997.⁴⁴ The selection process resulted in the Air Force receiving approval for the closure or realignment of thirteen major installations.⁴⁵

The selection criteria for base closures in 1993 and 1995 remained unchanged from the 1991 closure round,⁴⁶ and the Air Force subsequently received approval for the closure or realignment of seven major bases in 1993⁴⁷ and six major bases in 1995.⁴⁸

⁴¹ *Id.* §2905(b).

⁴² *Id.* §2905(c). But this was really redundant as NEPA analysis was already mandated by existing law. See 42 U.S.C. §4321 (1998).

⁴³ *Id.* §2901.

⁴⁴ *Id.* §2904(a)(4).

⁴⁵ *Air Force BRAC Bases*, *supra* note 23. They were Bergstrom AFB, Tex., Carswell AFB, Tex., Castle AFB, Cal., Eaker AFB, Ark., England AFB, La., Grissom AFB, Ind., Loring AFB, Me., Lowry AFB, Colo., Myrtle Beach AFB, S.C., Richards-Gebaur AFB, Mo., Rickenbacker Air Nat'l Guard Base, Ohio, Williams AFB, Ariz., and Wurtsmith AFB, Mich. *Id.*

⁴⁶ *DOD Selection Criteria for Closing and Realigning Military Installations Inside the United States*, 57 Fed. Reg. 59334, 59335 (1992) and 59 Fed. Reg. 63769 (1994). It is of note that the 1995-closure selection process was the first round that considered conformity requirements "under the 1990 Clean Air Act, which prohibits a federal agency from supporting an action unless it determines that it conforms to the air quality implementation plan for the area." THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION, 1995 REPORT TO THE PRESIDENT, 5-11.

⁴⁷ *Air Force BRAC Bases*, *supra* note 23. They were Gentile AFS, Ohio, Griffiss AFB, N.Y., Homestead AFB, Fla., K.I. Sawyer AFB, Mich., March AFB, Cal., Newark AFB, Ohio, and Plattsburgh AFB, N.Y. *Id.*

Because the DBCRA-90 expired in 1995,⁴⁹ Congress must either pass new base realignment and closure legislation or DOD must follow the existing procedures in Section 2687 of Title 10 United States Code for any future base closures or realignments.

III. Binds that Tie – Planning Process: Air Force Base Conversion Agency (hereinafter AFBCA) and the Local Reuse Authority (hereinafter LRA).

Once final approval is received on the closure or realignment of the listed military installations, several organizations play an active role in the planning and implementation of the base's redevelopment plan. The four dominant players are the AFBCA, representing the Air Force, the LRA, representing the local community, and federal and state environmental regulatory agencies.⁵⁰

A. LRA.

The LRA is the authority or instrumentality established by state or local government as the entity responsible for developing the redevelopment plan or directing the implementation of the plan at the closed installation.⁵¹ Its members usually represent the political, economic, and other interests of the local community.⁵² Although receiving

⁴⁸ *Air Force BRAC Bases*, *supra* note 23. They were Kelly AFB, Tex., McClellan AFB, Cal., Onizuka Air Station, Cal., Ontario Int'l Airport Air Guard, Cal., Reese AFB, Tex., and Roslyn Air Nat'l Guard Base, N.Y. *Id.*

⁴⁹ DBCRA-1990, Pub. L. No. 101-510, §2903(b).

⁵⁰ DOD BASE REUSE IMPLEMENTATION MANUAL, DOD 4165.66-M, 2-4 (Dec. 1997) [hereinafter DOD BRIM]. Since its activation on November 15, 1991, the AFBCA is responsible for "executing the environmental programs and real and personal property disposal for major Air Force bases in the United States being closed or realigned." *AFBCA Fact Sheet* #FS-0 (last modified Dec. 9, 1998) <<http://www/afbca.hq.af.mil/factshts/index.htm>>. It provides "civilian reuse transition planning, caretaker services to include installation protection, maintenance and operations, environmental planning, compliance and restoration, and the disposal of real property and related personal property." *Id.* It further focuses on the President's Five-Part Plan, announced in July 1993, for "job-centered property disposal, fast-track cleanup, establishment of transition coordinators at each closing base, easy access to transition and redevelopment help, and larger economic development planning grants and technical assistance." DOD BRIM, *supra* note 50, at 4-8 and F-4.

⁵¹ 32 C.F.R. §175.3(g) (1998). Establishing procedures for LRAs vary from state-to-state, with some LRA's formed by a Governor's Executive Order or by state legislative action. *Community Guide to Base Reuse* (last modified Jun. 20, 1995) <http://www.acq.osd.mil/iai/reinvest/sect_3.html>.

⁵² *Community Guide to Base Reuse*, *supra* note 51. LRAs vary by size, composition, and structure, but are generally focused on fairly and equally representing the diverse interests of the community. *Id.* LRAs may

the majority of its funds from state or local government, the nascent LRA may obtain planning grant assistance from the Department of Defense's Office of Economic Adjustment (hereinafter OEA).⁵³

After identifying its members and receiving local support, the LRA must then seek and obtain formal recognition from the DOD's OEA.⁵⁴ A critical requirement before gaining recognition is for the LRAs to have the authority to accept and hold interests in real property thereby effectuating the transfer of military property.⁵⁵ Without such authority, any transfers can be subsequently voided.⁵⁶ Thereafter, the LRA works closely with the AFBCA in creating a comprehensive redevelopment plan for the land and facilities that were at the military base.⁵⁷

B. Redevelopment Plan.

In its preparations the LRA solicits ideas, options, and alternative uses for the base, conduct outreach activities that focus on community needs and identify interests in

consist of an executive council, with decision-making authority, and several subcommittees. *Id.* For example the Lowry Redevelopment Authority was created by the cities of Denver and Aurora and has a staff that varies seasonally from 100 to 150 employees, 95 of which work in operations. *See Member Update-Redevelopment in the Centennial State*, ICMA BASE REUSE CONSORTIUM BULLETIN, vol. 2, issue 2, at 12 (March/April 1998). It is also controlled by a twelve-member board of directors appointed by the mayors of both cities. *Id.* Additionally, a coordinating committee was established "consisting of the mayors, key city council members, their U.S. Congressional Representatives, and the directors of the planning departments of both cities." *Id.*

⁵³ *Community Guide to Base Reuse*, *supra* note 51. The OEA is the primary office of the DOD responsible for providing adjustment assistance to communities, regions and States adversely impacted by significant Defense program changes, including base closures or realignments. *Office of Economic Adjustment* (visited May 29, 1999) <<http://emissary.acq.osd.mil/bccr/oea/oeahome.nsf>>.

⁵⁴ BASE CONVERSION HANDBOOK, BRAC 95 UPDATE 1-6 (AFBCA) [hereinafter BASE CONVERSION HANDBOOK]. Specific procedural steps are not identified for the recognition process. *See Community Guide to Base Reuse*, *supra* note 51.

⁵⁵ BASE CONVERSION HANDBOOK, *supra* note 54, at 1-5.

⁵⁶ BASE CONVERSION HANDBOOK, *supra* note 54, at 1-5. At Griffiss AFB, N.Y., a transfer of real property by long-term lease to the Griffiss Local Development Corporation was disapproved because DOD learned that organization was not state-chartered and did not hold legal authority to negotiate for or accept real property. Interview with Brent Evans, Ass't Chief Counsel, AFBCA at Arlington, Va. (May 26, 1999). Valuable time was lost while a duly authorized organization was formed and appointed by New York. *Id.*

⁵⁷ *See* 32 C.F.R. §175.7(d).

personal and real property available at the base.⁵⁸ The LRA will focus on the community's goals and underlying objectives, assisted by facility studies, market analyses, environmental and property data from the Air Force and the economic and planning assistance from OEA.⁵⁹

With that information, the LRA will develop a comprehensive land-use plan that becomes the cornerstone of all future development. The plan will incorporate land-use categories, environmental considerations, and natural resource concerns.⁶⁰ Although the contents of the redevelopment land use plans are not specifically set out, they share some common elements.⁶¹ However, redevelopment plans usually differ from location to location because of the LRA's need to respond to the conditions and features unique to the closing or realigning of the military installation and the surrounding communities.⁶² The redevelopment plan also describes the reuse objectives and alternatives considered by the LRA, usually in terms of residential or commercial development.⁶³

⁵⁸ ICMA BASE REUSE HANDBOOK, *supra* note 2, at 5.

⁵⁹ *Community Guide to Base Reuse*, (last modified Aug. 3, 1995)

<http://www.acq.osd.mil/iai/reinvest/sect_4.html>. Objectives may encompass civilian job replacement; public use of some properties; phased development to meet short-term goals but not preclude longer-term goals; infrastructure upgrades; expanded site access and minimal public cost. *Id.* The ultimate goal is to devise a consensus-building plan that is also feasible. *Id.*

⁶⁰ DOD BRIM, *supra* note 50, at 2. Land use categories usually are residential, recreational, business or industrial. *Id.* See also 32 C.F.R. §175 (1998). The plan will also identify proposed zoning changes or designations and recommended conveyance methods, such as by lease or by deed. *AFBCA Fact Sheet #CP/RP-4* (last modified Nov. 1, 1997) <<http://www.afbca.hq.af.mil/factshts/index.htm>>.

⁶¹ DOD BRIM, *supra* note 50 at 3-16. Some of the shared elements are: an assessment of the local economy's strengths and weaknesses, identification of infrastructure requirements, sustainable reuse, a comprehensive redevelopment approach, zoning standards, and an implementation strategy that covers future tenants, developers, available funding and/or revenue, and incorporation of public comments. *Id.* See also *Community Guide to Base Reuse*, *supra* note 51.

⁶² *AFBCA Fact Sheet #CP/RP-4*, *supra* note 60. The LRA will have planned its market strategies and advertising mechanisms for attracting prospective developers or businesses to the closed base. ICMA BASE REUSE HANDBOOK, *supra* note 2, at 5.

⁶³ BASE CONVERSION HANDBOOK, *supra* note 54, at 1-24. The local redevelopment plan is usually used as the basis for the proposed action in conducting environmental analyses under NEPA. See 32 C.F.R. §175.7(d)(3). The military department's goal is to complete its NEPA analysis within one year after receiving the redevelopment plan. DOD BRIM, *supra* note 50, at 3-4.

The LRA and the community, "through public comment, must ensure that the plan developed adequately balances local community and economic development needs with those of the homeless."⁶⁴ The final redevelopment plan may take 18 to 24 months to complete and the LRA must then seek its approval from the military department effecting the closure.⁶⁵ It is critical that the military retain final approval authority because it ultimately remains responsible for environmental damage at the property. It should be allowed an opportunity to weigh the risk of specific users of the property to the need to protect human health and the environment. This allows an opportunity for the military to consider the short-term and long-term effect redevelopment would have on its remediation program.

C. National Environmental Policy Act of 1969.

As required by NEPA and base closure and realignment legislation, the Air Force performs an environmental impact analysis of prospective property disposal and reuse actions.⁶⁶ The AFBCA's goal is to have the analysis complete within one year from receiving the LRA's redevelopment plan.⁶⁷ In its analysis, the AFBCA will consider the

⁶⁴ DOD BRIM, *supra* note 50, at 3-2. The entire process, although straightforward, is time-consuming and subject to intense public scrutiny and false starts. *Community Guide to Base Reuse*, *supra* note 59. It is the LRA's responsibility to keep the planning process on track and to build a consensus. *Id.*

⁶⁵ DOD BRIM, *supra* note 50, at 3-4. *See also* ICMA BASE REUSE HANDBOOK, *supra* note 2, at 5. In a codependent relationship, the LRA provides a recommendation on the use of the property and the military department will make a recommendation on the user; nevertheless, the LRA's local planning process usually resolves any conflicting land use proposals. DOD BRIM, *supra* note 50 at 3-5 and 3-23. As stated earlier, it is important for the military to have input and remain involved in the mirroring of property use with potential tenants because of the military's retained environmental liability which is discussed in section IV of this paper.

⁶⁶ 42 U.S.C. §4321-4347. *See also* 40 C.F.R. §1500, 32 C.F.R. §989 and Air Force Instruction 32-7061, *The Environmental Impact Analysis Process* (1995). *See also* BASE CONVERSION HANDBOOK, *supra* note 54, at 1-53.

⁶⁷ *DOD Guidance on Accelerating the NEPA Analysis Process for Base Disposal*, DOD BRIM, *supra* note 50, at F-9. This policy applies to closures authorized under BRAC 88 or DBCRA-90. *Id.* Utilizing the LRA's reuse plan fulfills the requirement of law that the reuse plan be treated as part of the proposed federal action. *Id.* The policy also encourages early data development and data sharing with other ongoing processes supporting property transfers, such as the Environmental Baseline Survey, or studies supporting wetlands, cultural or historic resources, or natural resources. *Id.* at F-10. However, in the event the LRA's

LRA's proposed reuse activities, alternatives to those proposed actions, adverse impacts, if any, and environmental mitigation measures.⁶⁸

In complying with NEPA, the AFBCA may conclude the proposed disposal and reuse actions fall within previously published categorical exclusions,⁶⁹ or it may initiate an "environmental assessment" [hereinafter EA], or a more formal "environmental impact statement" [hereinafter EIS].

An EA is prepared when the proposed actions do not fall within a categorical exclusion or do not require a detailed EIS.⁷⁰ The AFBCA will also involve environmental agencies and the public in the preparation of the EA.⁷¹ Ultimately, the EA

reuse plan was not submitted by the time the NEPA analysis must be initiated, then the military department is authorized to proceed. *Id.* at F-10. Before any property is transferred, the military department will assure the NEPA documents adequately address the environmental impacts of the land uses identified in the final submittal of the reuse plan. *Id.* at F-10.

⁶⁸ DOD BRIM, *supra* note 50, at 2-7. Proposed alternatives also include the "no-action" alternative. *Id.* The military department conducting the NEPA analysis is obligated to alert the LRA to potential environmental problems and to cooperatively pursue modifications to the reuse plan when necessary. *DOD Guidance on Accelerating the NEPA Analysis Process for Base Disposal, supra* note 67, at F-9.

⁶⁹ 32 C.F.R. §989.13 and Att. 2. Categorical exclusions apply to Air Force actions that have minimal adverse effect on environmental quality, impose no significant change to conditions, or cumulative impact, impose socioeconomic effects only, or are similar to actions previously assessed and found to have no significant environmental impacts. *Id.* Air Force property that contained a school while the military base was operating and is subsequently transferred for use as a school fall within the categorical exclusion at 32 C.F.R. §989, Att. 2.3.7. It reads, "[c]ontinuation or resumption of pre-existing actions, where there is no substantial change in existing conditions or existing land uses and where the actions were originally evaluated in accordance with applicable law and regulations, and surrounding circumstances have not changed." *Id.* When infrastructure improvement and replacements are involved then the Air Force may assert the categorical exclusion of "[i]nstalling, operating, modifying, and routinely repairing and replacing utility and communications systems, data processing cable, and similar electronic equipment that use existing rights of way, easements, distribution systems, or facilities." *Id.* at Att. 2.3.12. The Air Force has never used a categorical exclusion to convert an entire base. Interview with Brent Evans, Ass't Chief Counsel, AFBCA, Arlington, Va. (Jun. 14, 1999).

⁷⁰ 32 C.F.R. §989.14. The EA discusses the need for the proposed action, reasonable alternatives, the affected environment, the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted. *Id.* The AFBCA also must comply with any additional requirements imposed by specific base closure or realignment legislation. *Id.* §989.24. Some actions that require an EA are: public land withdrawals of less than 5,000 acres, minor mission realignments and aircraft beddowns, building construction in developed areas, and remediation of hazardous waste disposal sites. *Id.* §989.14(h). An EA was used for the disposition of Roslyn Air National Guard Station, N.Y. in the 1995 closure rounds. Interview with Brent Evans, *supra* note 69.

⁷¹ 32 C.F.R. §989.14(j) and 40 C.F.R. §1501.4(b).

process results in either a Finding of No Significant Impact (hereinafter FONSI),⁷² or the completion of a formal EIS.⁷³

An EIS is the longer and more detailed process for proposed actions that have the potential for significant degradation of the environment, or pose a significant threat to public health and safety, or cause substantial environmental controversy.⁷⁴

The military department initiates a public scoping process, prepares a preliminary draft, obtains public review and comments, responds to such comments, and prepares a final EIS.⁷⁵ The entire process generally results in a Disposal Record of Decision (hereinafter D-ROD).⁷⁶ The D-ROD identifies the “disposal actions that have been selected, the alternatives considered, the potential environmental impact of each alternative, and any specific mitigation activity to support the decision.”⁷⁷

Completion of the NEPA process allows the Air Force to dispose of the property at the closing or realigning base.⁷⁸

D. Personal Property Transfers.

The LRA is also involved in the base’s inventory of personal property, helping the installation commander to identify what is or is not available for reuse.⁷⁹ There are four

⁷² 32 C.F.R. §989.15 and 40 C.F.R. §1508.13. The FONSI is a document based on an analysis of effects disclosed in the EA and it states why a proposed action will not significantly affect the environment and why an EIS will not be prepared. *Id.* The draft EA/FONSI is made available to the public for comment, unless precluded for security reasons. *Id.* §989.15(e)(1).

⁷³ DOD BRIM, *supra* note 50, at 2-7.

⁷⁴ 32 C.F.R. §989.16 and 40 C.F.R. §1502. The disposal and reuse of closing installations normally, but not always, requires an EIS. *Id.* §989.16(b)(7).

⁷⁵ 32 C.F.R. §989.18-20 and 40 C.F.R. §1502.19. The purpose of scoping is to de-emphasize insignificant issues and focus on significant issues. *Id.* §989.18.

⁷⁶ 32 C.F.R. §989.21 and 40 C.F.R. §1505.2. The D-ROD is a concise public document stating the agency’s decision on a specific action. *Id.* §989.21. It is also publicly disclosed. *Id.* §989.23. BASE CONVERSION HANDBOOK, *supra* note 54, at 1-113.

⁷⁷ DOD BRIM, *supra* note 50, at 2-8. *See also* 32 C.F.R. § 989.21.

⁷⁸ DOD BRIM, *supra* note 50, at 2-8.

⁷⁹ DOD BRIM, *supra* note 50, at 4-3. The inventory is undertaken within 6 months after the date of approval of closure or realignment. *See* 32 C.F.R. §175(h) (1998).

recognized categories for the inventory of personal property.⁸⁰ After the inventory is completed, but prior to any conveyance to the LRA, all personal property necessary to meet military requirements is removed.⁸¹

E. Real Property Transfers.

Concurrent with the LRA's preparation of a comprehensive redevelopment plan, the AFBCA identifies real property available for reuse. The AFBCA's first step is reviewing past conveyance instruments and property titles to determine whether they contain reversionary rights or reverter clauses.⁸² If such rights exist then the property is returned to its original owner.⁸³

Conveyance or disposal of the property by lease or by deed for civilian reuse is conducted in accordance with prescribed decision documents and varying conveyance authorities.⁸⁴ Seven of those conveyance methods available to the military are discussed next:⁸⁵

⁸⁰ DOD BRIM, *supra* note 50, at 4-3. The four recognized categories are: (1) needed to support a military mission; (2) needed to support the LRA's redevelopment plan; (3) ordinary fixtures; and (4) property available for use by other federal agencies. See 32 C.F.R. §175(h).

⁸¹ DOD BRIM, *supra* note 50, at 4-3. Unlike conflicting land use proposals, the military department resolves any disputed personal property decisions. *Id.* at 4-8.

⁸² DOD BRIM, *supra* note 50, at 3-7.

⁸³ DOD BRIM, *supra* note 50, at 3-7. Historically, property for military installations was sometimes obtained from state and local governments at a reduced price or at no cost, and the conveyance instrument may have included reversionary rights or reverter clauses that provide for return of the property once the military need ended. *Id.* "However, the mere fact that property had been donated to the military does not per se establish a reversionary right on the part of the donor." *Id.*

⁸⁴ DOD BRIM, *supra* note 50, at 2-12. Conveyances are established by the Federal Property and Administrative Services Act of 1949, the Surplus Property Act of 1944, the Act of May 19, 1948, the Base Closure Community Redevelopment and Homeless Assistance Act of 1994, and other authorizing statutes, as implemented in the Federal Property Management Regulations. *Id.*

⁸⁵ DOD BRIM, *supra* note 50, at 2-13. They are: federal agency transfers of excess property, public purpose/benefit conveyances, homeless assistance conveyances, Economic Development Conveyances, negotiated sales, advertised public sales, conveyances for the cost of environmental remediation, depository institution facilities, and leaseback conveyances. *Id.* Although the authority for conveyances for the cost of environmental remediation expired on November 30, 1998, the Air Force had not previously utilized that mechanism for real property transfer. *Id.* at 2-14. See also Interview with Brent Evans, Ass't Chief Counsel, AFBCA, Arlington, Va. (Jun. 24, 1999). Had it been used and actual remediation costs exceeded the estimated cost at time of transfer then the LRA would still be responsible for the extra cost. *Id.*

1. Intergovernmental Transfers.

The AFBCA will send out a formal notice of availability to other DOD components, and other federal agencies identifying excess property available for transfer.⁸⁶ Within 60 days of this notice, the interested DOD component or federal agency must submit an application for transfer of the specific property to them.⁸⁷ During this entire process the Air Force keeps the LRA informed about the interest generated for the property.⁸⁸ After reviewing the applications against seven regulatory factors, the military department either approves or disapproves the property transfers.⁸⁹ It must issue its determination of what constitutes surplus property within 100 days of the issuance of the notice of availability.⁹⁰ Its decision is conveyed to the LRA and the transfers are

Furthermore, both the LRA and the state regulatory agency would execute a consent agreement holding the LRA responsible for the remediation. *Id.* It is still possible for the Air Force to use the concept of transfers for the cost of environmental remediation in more traditional land disposal mechanisms by negotiating remediation performance in lieu of cash payment to the Air Force. *Id.*

⁸⁶ 32 C.F.R. §175.7. This requirement was established by the DBCRA-90. *Id.* The notice of public availability must be issued within one week of final approval of the closure and realignment. *Id.* It is a public document that describes the property and buildings that are available for transfer. *Id.* However, withdrawn public domain lands are under the jurisdiction of the Secretary of the Interior and are not contained in the notice. *Id.*

⁸⁷ *Id.* An application includes either GSA Form 1334, Request for Transfer, or DD Form 1354 with supporting documents. *See* 32 C.F.R. §175.7(a)(9)(i-ix). *See also* Federal Property Management Regulations, 41 C.F.R. §101-47.201 *et seq.* (1998).

⁸⁸ 32 C.F.R. §175.7 (7).

⁸⁹ 32 C.F.R. §175.7(a)(10)(i-vii). Factors considered are: (1) the validity and appropriateness of the requirement upon which the proposal is based; (2) proposed federal use is consistent with the highest and best use of the property; (3) transfer will not have an adverse impact on the transfer of any remaining portion of the base; (4) transfer will not establish a new program or substantially increase the level of an agency's existing programs; (5) application offers fair market value for the property, unless waived; (6) transfer addresses environmental responsibilities; and (7) the transfer is in the best interest of the government. *Id.* *See also* 41 C.F.R. 101-47.201-2.

⁹⁰ 32 C.F.R. §175.7(a)(13). If requested by the LRA, the surplus determination may be delayed up to six months after the date of approval of the base's closure or realignment. *Id.* In unusual circumstances, extensions beyond six months may be granted by the Deputy Undersecretary of Defense of Industrial Affairs and Installations. 32 C.F.R. §175.7(a)(13)(i). *See also* DOD BRIM, *supra* note 50, at 3-7.

integrated into the LRA's redevelopment plan, and the LRA's focus is then shifted to the surplus property that is available for reuse by the local community.⁹¹

2. Public Purpose/Benefit Conveyances.

The LRA may also solicit parties interested in and eligible for public purpose conveyances covering airports, educational facilities, health facilities, parks, recreational areas, historic monuments, ports, and wildlife refuges as may be appropriate.⁹² These conveyances allow for the property to be transferred for less than fair market value.⁹³

3. Homeless Assistance.

During the redevelopment planning stage, the LRA is also identifying property of potential interest to advocates for the homeless. Bases identified for closure or realignment in 1988, 1991, and 1993, must comply with the homeless assistance procedures established by Title V of the McKinney Act, which addresses many forms of assistance to the homeless.⁹⁴ Those identified for closure or realignment in 1995 must comply with the Redevelopment Act of 1994 in identifying interests of state and local governments, representatives of the homeless and other interested parties in the surplus property.⁹⁵

4. Interim Leasing of Real Property.

⁹¹ *AFBCA Fact Sheet # CP/DP-1* (last modified Nov. 1, 1997)

<<http://www.afbca.hq.af.mil/factshts/index.htm>>. Surplus property is that which is no longer needed by the federal government. *Id.*

⁹² Property for public airports is governed by 49 U.S.C. §47151-47153 and 41 CFR §101-47.308 (1998). These requests are forwarded to the Federal Aviation Administration for their approval before transfer occurs. 41 C.F.R. §101-47.308-2 et seq. The transfer of property for educational or public health purposes is governed by 41 C.F.R. §101-47.308-4.

⁹³ DOD BRIM, *supra* note 50, 2-13.

⁹⁴ 42 U.S.C. §11411 and Pub. L. No. 103-160, tit. XXIX, §2910 (Nov. 30, 1993). The LRAs may elect to follow the Base Closure Community Redevelopment and Homeless Assistance Act of 1994 [hereinafter Redevelopment Act]. See DOD BRIM, *supra* note 50, at 3-11. See also 32 C.F.R. §175.7(b).

⁹⁵ Redevelopment Act Pub. L. No. 103-421, Oct. 25, 1994, (codified at 42 U.S.C. §11301). See also DOD BRIM, *supra* note 50, at 3-11. The Redevelopment Act gave the LRAs the responsibility to screen and

Unlike private party transactions, leasing arrangements with the military require compliance with a host of federal laws and regulations that, at times, can be inflexible. At closing or realigning bases, not all property may be available for immediate transfer, but in the interest of encouraging speedy economic development the military department works closely with the LRA and the environmental regulatory community to identify property potentially available for transfer.⁹⁶ A number one concern is to ensure that any leasing will not interfere with base operations, closure processes, or environmental cleanup operations.⁹⁷ The impact of environmental cleanup is discussed further in section IV of this paper.

Currently, interim leasing is the most common mechanism used to foster economic redevelopment between the final approval date of the recommendation for the base's closure and realignment and the completion of the approved disposal process by the AFBCA.⁹⁸ Its goal is to make "real property available...while ensuring compliance with environmental requirements and without adversely affecting the Air Force mission, including closure activities."⁹⁹ However, each closed or realigned base will have site-specific real estate, environmental, and natural and cultural resources requirements because of differing local, regional, and state laws and regulations.¹⁰⁰

The LRA submits an application to the AFBCA requesting an interim lease. The LRA includes information on the prospective sublessee, the amount and type of property to be leased, the intended use, the operational requirements needed by the sublessee, and

negotiate with the intended recipients, whereas under the McKinney Act the Air Force negotiates with the intended recipients. See *supra* note 94.

⁹⁶ DOD BRIM, *supra* note 50, at 5-6.

⁹⁷ DOD BRIM, *supra* note 50, at 5-6.

⁹⁸ *Air Force Base Conversion Agency Fact Sheet* #FS-3 (last modified Nov. 1, 1997)

<<http://www.afbca.hq.af.mil/factshts/index.htm>>.

⁹⁹ *Id.* See also 10 U.S.C. §2667.

any pertinent financial arrangements.¹⁰¹ The AFBCA reviews the application and consults with the installation commander to ensure the facility or property is available and that its use by the proposed tenant is compatible with ongoing missions.¹⁰²

The AFBCA uses a "model" interim lease that contains many lease provisions that are non-negotiable, due to requirements of federal laws and regulations.¹⁰³ The draft lease is then forwarded to the LRA and any prospective sublessee for review and comment.¹⁰⁴ The LRA manages the business and financial dealings with the sublessee, but must forward a copy of the sublease to the military.¹⁰⁵ Negotiations may follow on any requested change to the language. The AFBCA seeks to obtain rental payments based on the fair rental market, but may agree to less than that amount if the lessee or sub-lessee provides sufficient justification.¹⁰⁶ It must demonstrate that a "public interest will be served as a result of the lease; and the fair market value of the lease is unobtainable, or not compatible with such public benefit."¹⁰⁷

The property is subsequently leased directly to the LRA for interim use, and then subleased by the LRA.¹⁰⁸ The property is usually leased for a term of one year, with four

¹⁰⁰ DOD BRIM, *supra* note 50, at 5-2.

¹⁰¹ AFBCA Fact Sheet # FS-3, *supra* note 98.

¹⁰² DOD BRIM, *supra* note 50, at 5-15. Several meetings may be held to ensure complete and accurate information is provided, but if the military department is in agreement an interim lease is prepared. AFBCA Fact Sheet #FS-3, *supra* note 98.

¹⁰³ DOD BRIM, *supra* note 50, at 5-10. Non-negotiable language includes, but is not limited to: hold harmless/indemnity clause; right to enter; environmental protection; and officials not to benefit. *Id.*

¹⁰⁴ AFBCA Fact Sheet #FS-3, *supra* note 98. Leasing generally occurs between the military department and the LRA as lessee and not with the sublessee. DOD BRIM, *supra* note 50, at 5-10. AFBCA Fact Sheet #FS-3, *supra* note 98. With the passage of the National Defense Authorization Act of 1996, terms may "extend beyond the expected completion date for the disposal Environmental Impact Statement." *See* Pub. L. No. 104-106, §2833 (Feb. 10, 1996).

¹⁰⁵ DOD BRIM, *supra* note 50, at 5-10. The sublease cannot be inconsistent with the main lease. *Id.*

¹⁰⁶ AFBCA Fact Sheet #FS-3, *supra* note 98.

¹⁰⁷ DOD BRIM, *supra* note 50, at 5-8.

¹⁰⁸ AFBCA Fact Sheet #FS-3, *supra* note 98. The Air Force is generally required to use competitive bidding if trying to lease directly to a private interest. *Id.* These interim leases also provide that the tenants or subtenants obtain no right to acquire the leased property and they do not obtain a first right of refusal for future sales of the property. *Id.* *See also* 32 C.F.R. §175.7(g).

subsequent one-year renewal periods available.¹⁰⁹ After a final interim lease is approved, the AFBCA and the LRA will inspect the property at both the beginning term and end term of the lease to note the condition of the property.¹¹⁰ This process affords the AFBCA another “snapshot in time” to ascertain later impacts on the property from the lessee’s or sub-lessee’s activities.¹¹¹ The interim lease is a tool to promote economic benefits to the LRA quickly, but is not envisioned as a long-term mechanism for economic growth, because it is not a permanent transfer that affords the assurances of long-term growth and investment in the community.

Under special circumstances, the AFBCA may grant a longer term for the interim lease and thus delay disposal of the property.¹¹² All leases also contain the military department’s right to terminate and remove the lessee and consequently the sublessee before the term of the lease for failing to comply with the provisions in the lease or in the event of a national emergency as declared by the President or by Congress.¹¹³

Prior to executing the lease, four documents are prepared by the AFBCA: an environmental impact analysis under NEPA, an Environmental Baseline Survey (hereinafter EBS),¹¹⁴ a Finding of Suitability to Lease (hereinafter FOSL), and an Environmental Condition Report (hereinafter ECR).¹¹⁵

¹⁰⁹ *AFBCA Fact Sheet #FS-3*, *supra* note 98. With the passage of the National Defense Authorization Act of 1996, terms may “extend beyond the expected completion date for the disposal Environmental Impact Statement.” See Pub. L. No. 104-106, §2833 (Feb. 10, 1996).

¹¹⁰ *AFBCA Fact Sheet #FS-3*, *supra* note 98.

¹¹¹ *AFBCA Fact Sheet #FS-3*, *supra* note 98. These provisions are necessary because the timing of the lease occurs before the AFBCA’s final disposal decisions; thus changes may be necessary later. *Id.*

¹¹² *AFBCA Fact Sheet #FS-3*, *supra* note 98. Interim leases generally terminate when final reuse and disposal decisions are implemented, however it can be converted into a long-term lease or deed transfer, at the completion of the NEPA process. *Id.*

¹¹³ DOD BRIM, *supra* note 50, at 5-8.

¹¹⁴ *Id.* To be discussed in section IV, paragraph G of this paper.

¹¹⁵ *AFBCA Fact Sheet #FS-3*, *supra* note 98.

The FOSL is the end result of a process intended to determine whether property is environmentally suitable for its intended use by the tenant and whether there should be any restrictions on its use.¹¹⁶ It is not required by environmental law, but rather by DOD policy.¹¹⁷ There are three underlying factors upon which a FOSL is based.¹¹⁸ The FOSL focuses on the activities that a lessee is permitted to undertake to ensure that the lessee does not endanger its self or exacerbate existing environmental conditions.¹¹⁹ Any restrictions or conditions on use are identified in the FOSL and must be incorporated into

¹¹⁶ ICMA BASE REUSE HANDBOOK, *supra* note 2, at 7. See also *AFBCA Fact Sheet #DD-1* (last modified Nov. 1, 1997) <<http://www.afbca.hq.af.mil/factshts/index.htm>>. The underlying foundation of the needed review necessary before a FOSL determination could be made is the EBS and any appropriate local reuse plan, and the FOSL must be completed before any property can be conveyed by lease. *Id.*

¹¹⁷ *DOD Policy on the Environmental Review Process to Reach a Finding of Suitability to Lease (FOSL)*, DOD BRIM, *supra* note 50, at F-15. The policy applies to bases realigned and closed pursuant to the authority of BRAC 88 and DBRAC-90. *Id.* Its stated objectives is to: "ensure protection of human health and the environment; develop a DOD-wide process to assess, determine and document the environmental suitability of properties (parcels) for outlease; ensure outleases of properties do not interfere with environmental restoration schedules and activities being conducted under the provisions of law or regulatory agreements; ensure compliance with all applicable environmental requirements and establish the basis for the DOD Components to make notifications to lessees regarding hazardous substances (including asbestos and any substance regulated under CERCLA, RCRA or state law) and petroleum products (including their derivatives, such as aviation fuel and motor oil) potentially on the property; and provide adequate public and regulatory participation." *Id.*

¹¹⁸ The three bases for a FOSL are: "hazardous substance notice need not be given because no hazardous substances or petroleum products were stored for one year or more, known to have been released, treated or disposed of on the parcel; hazardous substance notice will be given of the type and quantity of hazardous substances or petroleum products, and the time at which storage for one year or more, release, treatment or disposal took place, but the property is not now contaminated with hazardous substances or petroleum products (e.g. storage for one year or more but no release, a release has occurred but no response action is required, or a response action has been completed); or the property contains some level of contamination by hazardous substances or petroleum products, and hazardous substance notice will be given... However, this property can be used pursuant to the proposed lease, with the specified use restrictions in the lease, with acceptable risk to human health or the environment and without interference with the environmental restoration process. (The specific lease restrictions on the use of the parcel to protect human health and the environment and the environmental restoration process will be listed in the FOSL)." *Id.* at F-17.

¹¹⁹ *Id.* at F-18. It is required that the lease contains conditions to ensure: notification of the existence of a Federal Facility Agreement, Interagency Agreement, or other regulatory agreements, orders or decrees for environmental restoration, if any and that the terms of the lease do not affect the rights and obligations of parties under the identified agreements; that environmental investigations and response oversight and activities will not be disrupted, to include continued access for DOD and regulatory agencies and assurances that the proposed use will not disrupt remediation activities; that human health and the environment are protected by preventing the inappropriate use of the property, compliance with health and safety plans, and all subsequent transactions concerning that property will comply with all such conditions. *Id.* Copies of all subleases must be provided to the DOD component with jurisdiction over the parcel and made available to the public upon request. *Id.* at F-19.

any lease.¹²⁰ During the process of preparing for a FOSL, the military must provide environmental regulators an “adequate opportunity to express their views.”¹²¹ Once finalized the military provides public notice of the signing of the FOSL and the FOSL is provided to each lessee prior to the execution of the lease.¹²²

The Environmental Condition Report (hereinafter ECR) is the final document prepared prior to the interim lease signing.¹²³ By signing the ECR, the parties are acknowledging the environmental conditions of the leased property and whether or not the lessee will perform its own environmental inspection and testing.¹²⁴ The ECR may be updated after the lessee vacates the property at the expiration of the term of the lease.¹²⁵

These documents serve dual roles by protecting the interests of the Air Force and the interests of the lessee. They ensure “the lessee is aware of the existing environmental condition of the leased property; to protect the Air Force from changes to the environmental conditions that might be caused by the lessee’s activities; and to provide the Air Force an understanding of the environmental impacts (if any) of the lease.”¹²⁶

5. Lease in Furtherance of Conveyance.

This leasing method is used after the military department complies with NEPA, has completed an EBS and a FOSL and issued its final disposal decision for the closing

¹²⁰ DOD BRIM, *supra* note 50, at 5-14.

¹²¹ DOD BRIM, *supra* note 50, at F-18. Draft documents are forwarded to the regulators for review and comment, and their comments are incorporated as appropriate, and any unresolved regulatory comments are included as attachments to the FOSL or EBS. *Id.*

¹²² DOD BRIM, *supra* note 50, at F-18. “Amendments, renewals, or extensions of leases [do] not require a new EBS or FOSL, or an updating of them, unless the leased premises change substantially or the permitted uses of them are to change in environmentally-significant ways.” *Id.* at F-19.

¹²³ AFBCA Fact Sheet #FS-3, *supra* note 98. The ECR is signed by both parties. *Id.* Specific environmental requirements are also incorporated into the interim lease which are discussed in section E. of this paper.

¹²⁴ AFBCA Fact Sheet #FS-3, *supra* note 98. This relates back to a “due diligence” defense for future cleanup responsibility for contamination. *Id.*

¹²⁵ AFBCA Fact Sheet #FS-3, *supra* note 98.

¹²⁶ AFBCA Fact Sheet #FS-3, *supra* note 98.

or realigning property.¹²⁷ The authority for leases in furtherance of conveyance is an amendment to CERCLA §9620(h)(3) by Section 2834 of the National Defense Authorization Act of 1996. It stated that the deed covenant requirements of CERCLA do not apply to leases at military installations “regardless of whether the lessee has agreed to purchase the property or whether the duration of the lease is longer than 55 years.” This type of lease provides immediate possession of the property to the recipient identified in the disposal decision.¹²⁸ This lease may be long-term and may cover all or a portion of the property identified in the disposal decision.¹²⁹ Nevertheless, it will terminate when a deed is executed.¹³⁰ Provisions of the lease in furtherance of conveyance mirror the AFBCA’s “model” interim lease agreement, including environmental provisions and termination rights by the federal government.¹³¹

6. Economic Development Conveyances [hereinafter EDC].

An EDC was specifically created to spur economic redevelopment and job creation and is a more flexible mechanism.¹³² An EDC allows the transfer of military property to LRAs for equal to or less than fair market value, but only after adoption of the LRA’s redevelopment plan.¹³³ Generally, large parcels of property, rather than individual

¹²⁷ DOD BRIM, *supra* note 50, at 5-3. The authority for leases in furtherance of conveyance is an amendment to CERCLA by Section 2834 of the National Defense Authorization Act of 1996. It stated that the deed covenant requirements of CERCLA do not apply to leases at military installations “regardless of whether the lessee has agreed to purchase the property or whether the duration of the lease is longer than 55 years.” DOD BRIM, *supra* note 50, at 5-3.

¹²⁸ DOD BRIM, *supra* note 50, at 5-3.

¹²⁹ DOD BRIM, *supra* note 50, at 5-3.

¹³⁰ DOD BRIM, *supra* note 50, at 5-3.

¹³¹ DOD BRIM, *supra* note 50, at 5-12. It also narrowly identifies the use of the property to ensure its compatibility with the land disposal decision. *Id.* at 5-13.

¹³² NDAA of FY1994, Pub. L. No. 103-160, *supra* note 27 at §2903. *See also* 32 C.F.R. §175.7 (1998) and DOD BRIM, *supra* note 50, at 7-1. The LRA is the only entity able to receive property under an EDC. *See* 32 C.F.R. §175.7(e).

¹³³ DOD BRIM, *supra* note 50, at 7-4. Consideration for the transfer may be in cash or in kind, with or without initial payment, or with only partial payment at time of transfer. *See* 32 C.F.R. §175.7(f). If the EDC is transferred for less than the estimated range of fair market then the military department must

buildings, are conveyed by this method for long-term redevelopment.¹³⁴ The LRA submits its application for an EDC to the military department effecting the transfer.¹³⁵ The application must be submitted one year from the submission of the redevelopment plan or the closure date for the installation, whichever is earlier.¹³⁶ Upon receipt of the application, the military department must consider ten factors in evaluating the application and the proposed terms and conditions of the transfer.¹³⁷ Approval or disapproval authority rests with the Secretary of the Military Department involved in the transaction.¹³⁸

7. Leaseback Conveyances.

A unique mechanism, the leaseback allows the military department to transfer nonsurplus property at a closing or realigning base to an LRA by deed or through a lease

prepare a written explanation of why the LRA's consideration was less. DOD BRIM, *supra* note 50, at 7-12. The military department also has discretion in establishing appropriate financing options for the LRA to effectuate the EDC transfer. *Id.* at 7-13.

¹³⁴ DOD BRIM, *supra* note 50, at 7-4. The LRA is not permitted to select only high-value facilities for the EDC parcel, rather, the income received from some of the higher-value property should be used to offset costs of the less desirable parcels. *Id.* Furthermore, there is generally only one EDC application per installation. *Id.*

¹³⁵ 32 C.F.R. §175.7(e)(4). The application must explain why an EDC is necessary for economic redevelopment, why other disposal authorities cannot be used, and include a copy of the redevelopment plan, a project narrative, a description of how it will contribute to short-and long-term job creation, a business plan for the EDC parcel, a statement of the LRA's legal authority to acquire and dispose of property, and any statement justifying a requested discount on the fair market value of the property. *Id.* §175.7(e)(5) *et seq.* See also DOD BRIM, *supra* note 50, at 7-4 and 7-9.

¹³⁶ DOD BRIM, *supra* note 50, at 7-4.

¹³⁷ 32 C.F.R. §175.7(e)(7). Potential for economic recovery, extent of job generation, consistency with the LRA's redevelopment plan, financial feasibility, extent of local investment and the LRA's ability to implement the plan, current real estate market conditions, incorporation of other federal interests and concerns, relationship to the military's disposal plan, economic benefit to the federal government, and compliance with federal, state, and local laws. *Id.* The military department may seek additional information from the LRA as needed. DOD BRIM, *supra* note 50, at 7-11.

¹³⁸ DOD BRIM, *supra* note 50, at 7-11. On Apr. 21, 1999, the DOD announced its intent to "ask Congress for authority to transfer former base property to local communities at no cost if they use it for job-generating economic development. This new policy of no-cost [EDC] will minimize the need for time-consuming property appraisals and negotiations, thereby speeding property transfer and reuse." *Plan Made to Speed Community Reuse of Former Military Bases*, (visited Jun. 4, 1999) <<http://www.defenselink.mil/cgi-bin/dlprint>>.

in furtherance of conveyance.¹³⁹ The transfer requires the LRA to lease the property back rent-free to the federal agency in need of the property.¹⁴⁰ The optimum situation for its use is when a singular building or small parcel of land is needed by the federal government, but is surrounded by, or adjacent to, a large parcel of land being transferred to the LRA.¹⁴¹ The leaseback allows the LRA an easy property transition when and if the federal government vacates the site.¹⁴²

IV. Environmental Restoration Provisions.

CERCLA is the preeminent statute for the identification and remediation of past contaminated sites. It amended the Solid Waste Disposal Act to authorize regulatory action or response to releases of hazardous waste from inactive hazardous waste sites that endanger public health and the environment.¹⁴³ CERCLA had a greater impact on federal facilities after its amendment in 1986.

A. Superfund Amendments and Reauthorization Act of 1986 (hereinafter SARA).

¹³⁹ DOD BRIM, *supra* note 50, at 2-13, 2-14 and 8-1. Nonsurplus property refers to property still needed by the federal government. The authorization for leases in furtherance of conveyance was §2837 of the NDAA-FY 1996. *See* Pub. L. No. 104-106.

¹⁴⁰ DOD BRIM, *supra* note 50 at 8-2. A lease in furtherance of conveyance is appropriate only in those circumstances where deed transfer cannot occur because of CERCLA requirements. *See* 32 C.F.R. §175.7(k)(7). The Secretary of the Military Department must certify that a leaseback is in the department's best interest and that its use is consistent with the obligation to close or realign the base. *Id.* at §175.7(k)(8)(ii).

¹⁴¹ DOD BRIM, *supra* note 50, at 8-2.

¹⁴² DOD BRIM, *supra* note 50, at 8-2. Only property at identified for closure or realignment in 1991, 1993, and 1995 can be transferred with a leaseback. By law, the term of the leaseback cannot exceed 50 years and if there is time remaining on the leaseback, the original federal agency using the facility may be replaced with another federal operation of similar usage for the remaining term of the lease. *Id.* at 8-6. If no federal agency is interested then the property reverts directly to the LRA. *Id.* at 8-7. *See also* 32 C.F.R. §175.7(k)(10).

¹⁴³ Pub. L. No. 96-510, tit. I, §120, as added Pub. L. No. 99-499, tit. I §120(a), Oct. 17, 1986, 100 Stat. 1666, and amended Pub. L. No. 102-426, §3, 4, and 5, Oct. 19, 1992, 106 Stat. 2175 to 2177. [codified at 42 U.S.C. 9620]. It further established prohibitions and requirements concerning such sites, and imposed liability against those persons responsible for the releases of hazardous waste. *Id.*

Title I of SARA added §120 to CERCLA addressing hazardous waste at federal facilities.¹⁴⁴ It forever changed the relationship between federal installations and state and local regulators because it included a waiver of federal sovereign immunity.¹⁴⁵

The inclusion of §120(h) in SARA would have a major effect on closing military installations' efforts to transfer property for two reasons: (1) it imposed on the federal government a notice requirement and covenant for property on which "any hazardous substance was stored for one year or more, known to have been released, or disposed of,"¹⁴⁶ and (2) property could not be deeded until restoration was complete.¹⁴⁷

After the initial base realignment and closure rounds, Congress acknowledged remediation of hazardous wastes at closed bases was delaying property transfer and consequently economic development for the local community.¹⁴⁸ In an effort to balance economic and environmental considerations, but facilitate timely property transfers, Congress amended §120(h)(3).¹⁴⁹

¹⁴⁴ SARA, Pub. L. No. 99-499, tit. I, §120(a)(1), 100 Stat. 1666 (Oct. 17, 1986). Section 120(b)-(f) outlined a comprehensive program designed to identify and clean up hazardous waste sites. *Id.*

¹⁴⁵ *Id.* §120(a)(1).

¹⁴⁶ *Id.* §120(h)(1). The federal government must include "in any contract for the sale or other transfer of real property... the type and quantity of such hazardous substance and notice of the time at which such storage, release, or disposal took place, to the extent such information is available on the basis of a complete search of agency files." *Id.* Any property deed must contain the notice described above, a description of the remedial action taken, if any, and a two-prong "covenant warranting that- [1] all remedial action necessary to protect human health and the environment with respect to any such substance remaining on the property has been taken before the date of such transfer, and [2] any additional remedial action found to be necessary after the date of such transfer shall be conducted by the United States." *Id.* §120(h)(3)(B). Of even more note, is the complete lack of documentation on Congress' rationale or legislative intent for imposing those covenants on CERCLA contaminated federal property transfers. H. REP. NO. 99-253(I) (1986), reprinted in 1986 U.S.C.C.A.N. 2835. The legislative history only focused on the cleanup provisions of SARA. *Id.* An exception was identified for cases in which "the person or entity to whom the property is transferred is a potentially responsible party with respect to such real property." *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Community Environmental Response Facilitation Act, Pub. L. No. 102-426 §2, 106 Stat. 2174 (Jan. 3, 1992).

¹⁴⁹ *Id.* §4. It defined "all remedial action be taken" prior to the property's transfer to mean "if the construction and installation of an approved remedial design has been completed, and the remedy has been demonstrated to the Administrator to be operating properly and successfully." *Id.* The carrying out of long

Pease Air Force Base in New Hampshire became the legal testing ground for these new covenants, but in the setting of a long term lease, rather than a deed.¹⁵⁰ The Air Force decided that in order to facilitate early reuse, long-term leases would be executed and then converted to a transfer by deed upon completion of the remediation process.¹⁵¹ Thereafter it signed a 55-year lease to the Pease Development Agency for several parcels of property.¹⁵² Suit was filed by the Conservation Law Foundation (hereinafter CLF) asserting the transfer via long term lease, as opposed to a transfer by deed, violated the covenants of §120(h)(3).¹⁵³ The court held that long-term leases equated to deeds, and thus their failure to include the §120 (h) covenants violated the letter and the spirit of CERCLA.¹⁵⁴

Reacting to a federal district court decision, that was perceived as undermining reuse plans at closing military installations, Congress passed an amended §120.¹⁵⁵ Long-

term pumping and treating, or operation and maintenance, after the remedy has been demonstrated to the Administrator to be operating properly and successfully does not preclude the transfer of the property.” Another provision of the covenant was added granting the federal government access to the transferred property in the event “remedial action or corrective action is found to be necessary after the date of such transfer.” *Id.* §4.

¹⁵⁰ *Conservation Law Found. v. Dep't. of the Air Force*, 864 F. Supp. 265, 270 (D.N.H. 1994), *aff'd in part and rev'd in part*, *Conservation Law Found. v. Busey*, 79 F.3d 1250, (1st Cir. 1996). The original Record of Decision addressed the transfer of contaminated sites and recognized the covenant requirements of CERCLA §120(h). *Id.* The leases would also contain environmental restrictions to protect human health and the environment. *Id.* Eight months later, a Supplemental Record of Decision expressed the Air Force's intention of leasing the parcels and conveying the same degree of control in the transferee as would be contained in a deed. *Id.* at 270.

¹⁵¹ *Id.* at 270. The need for the long term arrangement was to give Pease Development Agency and others a better chance to get bank loans.

¹⁵² *Id.* at 270.

¹⁵³ *Id.* at 291. CLF contended that while the express language of §120(h)(3) referred to deeds, by implication that same provision also applied to transfers via long term lease. *Id.* CLF also asserted the Air Force sought to circumvent the covenants by transferring the property by lease as opposed to by deed. *Id.* In contrast, the Air Force argued the covenants of §120(h)(3) did not apply to transfers by lease and stressed its intention to continue remediation at the sites. *Id.* at 292.

¹⁵⁴ *Id.* at 292. Accordingly, the court held that §120(h) was violated by the transfer of contaminated parcels via long term deed without an approved remedial design. *Id.* The court declined to void any lease but directed the Air Force to prepare a supplemental Final EIS delineating a remedial design. *Id.*

¹⁵⁵ HOUSE CONF. REP. NO. 104-450, 905 (1996), *reprinted in* 1996 U.S.C.C.A.N 238. Congress clearly stated its intent to allow DOD to sign long-term lease agreements at closing installations while environmental restoration is ongoing by exempting them from the requirements of §120(h)(3)(B). *See also*

term leases were no longer to be treated as deeds and therefore they did not trigger the covenants of CERCLA.¹⁵⁶

In the succeeding years after the introduction of the §120(h) covenants, a move was afoot in the private sector to encourage redevelopment of contaminated city property by limiting liability of purchasers who develop the land.¹⁵⁷ In contrast, purchases of federal contaminated lands were hampered or encumbered by enforcement of §120(h)(3).¹⁵⁸ The differing treatment of contaminated private property from that of federal property heralded a call for further amendments.¹⁵⁹

B. National Defense Authorization Act for Fiscal Year 1997. (hereinafter NOAA97)

Section 334 of NOAA97 amended CERCLA §120(h)(3) by creating a mechanism to defer the covenants until cleanup was complete, while still allowing the transfer of title in the contaminated property.¹⁶⁰ The deferral did not change any rights or obligation of a federal agency existing prior to transfer.¹⁶¹ To be eligible for the precleanup transfer

NDAA-FY1996, *supra* note 139 at §2834. "The requirements of subparagraph (B) shall not apply in any case in which the transfer of the property occurs or has occurred by means of a lease, without regard to whether the lessee has agreed to purchase the property or whether the duration of the lease is longer than 55 years. In the case of a lease entered into after September 30, 1995, with respect to real property located at an installation approved for closure or realignment under a base closure law, the agency leasing the property, in consultation with the Administrator shall determine before leasing the property that the property is suitable for lease, that the uses contemplated for the lease are consistent with protection of human health and the environment, and that there are adequate assurances that the United States will take all remedial action referred to in subparagraph (B) that has not been taken on the date of the lease." *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Raymond Takashi Swenson, *Normalizing Federal land Transfers: A New Tool for Base Reuse*, FED. FACILITIES ENVTL J. 31, 34 (Summer 1997). It signaled a move towards private purchases of contaminated land before cleanup occurred. *Id.*

¹⁵⁸ *Id.* at 34.

¹⁵⁹ Raymond Takashi Swenson, *supra* note 157 at 34.

¹⁶⁰ National Defense Authorization Act for Fiscal Year 1997 [hereinafter NDAA FY97], Pub. L. No. 104-201, tit. III, §334, 110 Stat. 2484, (Sept. 23, 1996).

¹⁶¹ NDAA FY97, §334. It also did not alter any rights or obligations under §106, §107, and §120 of CERCLA. *Id.* Either directly or indirectly the Air Force petitions OMB for cleanup funds, because the obligation to cleanup contaminated sites remains. Interview with Brent Evans, Ass't Chief Counsel, AFBCA at Arlington Va. (Sept. 8, 1999). In the case of federal real property on the National Priorities List both the Administrator of the Environmental Protection Agency and the Governor in which it is located

procedure it must be determined that: (1) the property is suitable for the transferee's intended use, and such use is consistent with the protection of human health and the environment; (2) the deed or other agreement contains specific response assurances; (3) the federal agency requesting deferral provides notice in the local newspaper and a period of 30 days for public comment; and (4) the deferral and the transfer of the property will not substantially delay any necessary response action at the property.¹⁶²

The deed or other property transfer agreement must provide: (1) for any necessary restrictions on the use of the property to ensure the protection of human health and the environment; (2) restrictions on use to ensure required remedial investigations, response, action, and oversight activities will not be disrupted; (3) that all necessary response action will be taken and identify the schedules for investigation and completion of all approved response actions; and (4) that the federal agency responsible for the property will submit a budget request that adequately addresses schedules for investigation and completion of all necessary response actions, subject to congressional authorizations and appropriations.¹⁶³

After cleanup is completed, the federal government must then add a federal warranty declaring that the response action necessary to protect human health and the environment has been taken.¹⁶⁴

must agree to the deferral. CERCLA §334. Only the Governor's consent is needed for property not listed on the National Priorities List. *Id.* §334.

¹⁶² *Id.* §334.

¹⁶³ NDAA FY97, §334, adding §120(h)(3)(C)(ii)(I)-(IV). In reviewing the legislative history, it was discussed that the new provision did not change existing federal cleanup responsibility nor limit or expand the existing waiver of sovereign immunity under CERCLA. *See* 1997 U.S.C.C.A.N. 2948. *See also* Barry P. Steinberg and Jennifer L. Peper, *Early Title Transfer of Contaminated Base Closure Property: Caveat Emptor*, FED. FACILITIES ENVTL J. 19, 21 (Spring 1997).

¹⁶⁴ NDAA FY97, §334. Such warranty would also satisfy the requirement for the need for "any necessary restriction on the use of the property to ensure the protection of human health and the environment." *Id.*

Proponents hailed it as a much needed step to placing the “development process [of contaminated property] and its cleanup process on parallel tracks, so that the latter does not hold up the former unnecessarily.”¹⁶⁵ It also gives buyers of federal land some of the flexibility or equal footing of purchasers of private or state-owned land.¹⁶⁶ Proponents of early transfer deeds also argue that LRAs benefit from this conveyance method because of their increased ability to secure financing, to invest in capital improvements, to assign or subdivide the property, and to reduce tiers of administrative management.¹⁶⁷

Skeptics express their concerns about the economic risk of accepting the property, as well as any perceived risk to human health and the environment.¹⁶⁸

C. Environmental Baseline Survey (hereinafter EBS).

To establish the environmental condition of property at closing or realigning bases the AFBCA conducts an EBS.¹⁶⁹ It is the mechanism for establishing compliance with CERCLA before any property is transferred. It consists of “the identification and analysis of all available and relevant records, a physical inspection of the base and adjacent property, a recorded chain-of-title documents review, interviews with past and current base employees and local officials, ...but does not involve new testing or analysis.”¹⁷⁰

¹⁶⁵ Raymond Takashi Swenson, *supra* note 157, at 34.

¹⁶⁶ Raymond Takashi Swenson, *supra* note 157, at 34.

¹⁶⁷ Raymond Takashi Swenson, *supra* note 157, at 34.

¹⁶⁸ Barry P. Steinberg and Jennifer L. Peper, *supra* note 163, at 20.

¹⁶⁹ *AFBCA Fact Sheet # CP/EB-1*, (last modified Nov. 1, 1997)

<<http://www.afbca.hq.af.mil/factshts/index.htm>>. See also Air Force Instruction 32-7066, *Environmental Baseline Surveys in Real Estate Transactions* and DOD BRIM, DOD Guidance on the Environmental Review Process to Reach a Finding of Suitability to Transfer for Property Where Release or Disposal has Occurred, *supra* note 50, at F-29.

¹⁷⁰ ICMA BASE REUSE HANDBOOK, *supra* note 2, at 7.

The EBS is the mechanism for satisfying several statutory and regulatory requirements. Pursuant to CERCLA, it serves to notify property lessees or transferees of the storage, release, or disposal of hazardous substances.¹⁷¹ Under the provisions of the Community Environmental Response Facilitation Act (hereinafter CERFA), the EBS helps identify uncontaminated property for transfer.¹⁷² That definition of “uncontaminated” property has changed over time. Currently, it is property on which no hazardous substances are known to have been released.¹⁷³ Therefore, property used for hazardous material storage can now be transferred as long as there has been no release. Any identification of uncontaminated property must receive the concurrence of the Administrator of the Environmental Protection Agency, and the appropriate state and local government officials.¹⁷⁴

The EBS also supports the Findings of Suitability to Lease and Findings of Suitability to Transfer required for real estate transactions.¹⁷⁵ It is a critical element in allowing the Air Force to “satisfy its due diligence requirements for real estate

¹⁷¹ *AFBCA Fact Sheet # CP/EB-1, supra note 169.*

¹⁷² *AFBCA Fact Sheet # CP/EB-1, supra note 169. See also* DOD BRIM, DOD Policy on the Implementation of the Community Environmental Response Facilitation Act, *supra* note 50, at F-23. CERFA was enacted in October 1992, to provide procedures for identifying uncontaminated property that may exist within the boundary of an installation slated for closure or realignment to facilitate speedy transfer. H.R. REP. NO. 102-814, at 6 (1992). It amended Section 120(h) of CERCLA by stating that the military department must determine whether any property is uncontaminated, by ensuring no hazardous substances or petroleum products or their derivatives were “stored for one year or more, known to be released, or disposed of.” *Id.* at 13.

¹⁷³ Defense Authorization Act for Fiscal Year 1997, tit. III, §331, Pub. L. No. 104-21, Sept. 23, 1996, 110 Stat. 2423, codified at 42 U.S.C. §9620(h)(4) (1998).

¹⁷⁴ H.R. REP. NO. 102-814, at 13 (1992). However, the Signing Statement of President George Bush reads, that if concurrence by an appropriate State official was “understood to allow the State official to prevent a Federal agency from disposing of property, then the Act would, in effect, be granting Federal Executive power to a person who has not been appointed in conformity with the Appointments Clause of the Constitution, Article II, section 2, clause 2. In order to avoid this constitutional difficulty, [the President] instructs all agencies affected by this Act to construe a State official’s failure to concur as a statement of that official’s views, but not as a bar to transfer of the property.” H.R. CONF. REP. NO. 102-986, at 12 (1992).

¹⁷⁵ *AFBCA Fact Sheet # CP/EB-1, supra note 169.*

transactions.”¹⁷⁶ Lastly, it provides a “snapshot in time” of the environmental condition of the property at the time of transfer (via deed or lease), in the event future questions arise over environmental contamination.¹⁷⁷ It helps to determine who is the responsible cleanup party.¹⁷⁸ When necessary, the EBS may be updated through a Supplemental EBS.¹⁷⁹

Property recipients are also required to perform environmental investigations pursuant to CERCLA to demonstrate their “due diligence” in order to establish an “innocent purchaser” defense against future environmental cleanup liability.¹⁸⁰

D. Current Application of CERCLA §120.

As currently written, CERCLA continues to dominate the environmental remediation landscape at closing or realigning military installations.¹⁸¹ The current standard for identifying uncontaminated property is that property “on which no hazardous substances and no petroleum products or their derivatives were stored for one year or more, known to have been released, or disposed of.”¹⁸² In identifying such property, the AFBCA must investigate the sites by reviewing information on the current and previous uses of the real property. The search involves reviewing federal records, chain of title documents, aerial photographs, visual inspections, physical inspection of adjacent property, available state and local government records of adjacent facilities where a “release of any hazardous substance or any petroleum product or its derivatives...which

¹⁷⁶ BASE CONVERSION HANDBOOK, *supra* note 54, at 1-71.

¹⁷⁷ AFBCA Fact Sheet # CP/EB-1, *supra* note 169.

¹⁷⁸ AFBCA Fact Sheet # CP/EB-1, *supra* note 169.

¹⁷⁹ AFBCA Fact Sheet # CP/EB-1, *supra* note 169.

¹⁸⁰ AFBCA Fact Sheet # CP/EB-1, *supra* note 169.

¹⁸¹ 42 U.S.C. §9620(a)

¹⁸² 42 U.S.C. §9620(h)(4)(A). Title III, Section 331 amended §120(h)(4)(A) of CERCLA by clarifying the meaning of uncontaminated property for purposes of transfer by the United States. *Id.*

is likely to cause or contribute to a release... on the real property.”¹⁸³ The AFBCA’s determination must be made within eighteen months after the announcement of the closing or realigning of the base.¹⁸⁴ The end product is reasonable and reliable information as to the parcels of land that remain uncontaminated and which may be more readily transferred. Under CERCLA §120(h)(4)(B) the identification of such uncontaminated property is considered incomplete until the state or federal EPA (where the site is on the National Priorities List) provides concurrence to the military.¹⁸⁵ There remains some dispute as to whether or not this provision is enforceable against the federal government because of the Appointments Clause of the U.S. Constitution.¹⁸⁶

For the property in which evidence of its contamination exists, CERCLA §120(h)(1) requires that any contract for the sale of the property must contain “a notice of the type and quantity of such hazardous substances and notice of the time at which such storage, release or disposal took place, to the extent such information is available on the basis of a complete search of agency files.”¹⁸⁷

The military must also include in any deed for the transfer of the property: a notice of the type and quantity of such hazardous substances and time at which such storage, release or disposal took place, a description of the remedial action taken, if any; a covenant warranting that all remedial action necessary to protect human health and the environment has been taken, and a covenant that any additional remedial action found to be necessary after the date of such sale or transfer shall be conducted by the federal

¹⁸³ 42 U.S.C. §9620(h)(4)(A).

¹⁸⁴ 42 U.S.C. §9620(h)(4)(C)(iv).

¹⁸⁵ 42 U.S.C. §9620(h)(4)(B). The CERCLA records review includes the documents that were the basis for the EBS. *Id.*

¹⁸⁶ U.S. Const. art. II, §2. *See also*, ICMA Base Reuse Handbook, *supra* note 2, at 61. To date no court has interpreted this statute to bar state concurrence. *Id.*

¹⁸⁷ 42 U.S.C. §9620(h)(1).

government; and a clause allowing the federal government access to the property in the event remedial action or corrective action is found to be necessary after the effectuation of the transfer of the property.¹⁸⁸ The construction and installation of an approved remedial design that is operating properly and successfully and approved satisfies the remedial action requirement.¹⁸⁹ Consequently, a long-term pump and treat operation on the property may still allow the property to be transferred.¹⁹⁰

Furthermore, the federal government is also required to include an indemnification clause in the transfer agreement to the transferee stating that the federal government remains liable for all cleanup costs necessitated by the contamination caused by the military.¹⁹¹

The property transfer is effectuated by a quitclaim deed¹⁹² In its deed preparations the Air Force must consider and include:

1. The applicable CERCLA statement identifying that all necessary environmental remedial actions, if necessary, have been taken.¹⁹³
2. The CERCLA certification, if applicable, that any additional remedial action found to be necessary will be taken by the federal government.¹⁹⁴
3. Any conditions on land use (e.g. restrictions requiring that real estate conveyed for a public airport continue to be used for that purpose), and any associated clauses that provide for reversion of the real property to the federal government if the restrictions are breached.
4. Other land-use restrictions, if appropriate, that are necessary based on environmental cleanup decisions.
5. Any necessary measures, generally, in the form of covenants, that must be adopted by the recipient to alleviate environmental

¹⁸⁸ *Id.* §9620(h)(3) (1998). [As amended by §334 of the 1997 Defense Authorization Act.]

¹⁸⁹ *Id.* §9620(h)(3) (1998).

¹⁹⁰ *Id.* §9620(h)(3) (1998).

¹⁹¹ National Defense Authorization Act for Fiscal Year 1993, §330, Pub. L. No. 102-484, 106 Stat. 2315, 2371 (Oct. 23, 1992) (codified at 10 U.S.C. §2687 note).

¹⁹² *AFBCA Fact Sheet #DI-4* (last modified Nov. 1, 1997)

<<http://www.afbca.hq.af.mil/factshts/index.htm>>.

¹⁹³ 42 U.S.C. §9620(h)(3)(A)(ii)(I); CERCLA §120(h)(3)(A)(ii)(I).

¹⁹⁴ 42 U.S.C. §9620(h)(3)(A)(ii)(I); CERCLA §120(h)(3)(A)(ii)(I).

impacts of real estate reuse and redevelopment, as identified during the environmental impact analysis and included in the real property disposal decision.¹⁹⁵

Both federal law and DOD policy mandates the Air Force assemble five documents before effecting the transfer.¹⁹⁶ They are 1) the environmental impact analysis required by NEPA, 2) a Record of Decision or other similar decision document, 3) an EBS, 4) a Finding of Suitability to Transfer (hereinafter FOST), and 5) the deed.¹⁹⁷ The first three documents were discussed earlier at section , the FOST will now be described.

The FOST is the final document in which the Air Force certifies that environmental requirements have been met, thereby allowing transfer of the property by deed.¹⁹⁸ The FOST is required under CERCLA §120 and complies with the notification, covenant, and access requirements that confirm the Air Force's environmental cleanup responsibilities.¹⁹⁹ Compliance with DOD and Air Force guidance will result in one of two determinations: (1) no hazardous substances or petroleum products or their derivatives have been released or disposed of on the parcel of land, or (2) hazardous substances or petroleum products or their derivatives were released or disposed of on installation property, but that either: (a) concentrations of contaminants do not require remedial action, or b) all remedial action necessary to protect human health and the environment with respect to any hazardous substance remaining on the property has been

¹⁹⁵ *AFBCA Fact Sheet #DI-4, supra* note 192.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* See also DOD BRIM, *supra* note 50, at F-29.

¹⁹⁹ *AFBCA Fact Sheet #DD-1, supra* note 116.

taken.²⁰⁰ The FOST must be supported by current information from the EBS before the property can be transferred.²⁰¹

E. Base Realignment and Closure (BRAC) Environmental Restoration Program.

Bases prior to closure or realignment maintained environmental cleanup programs, but after their selection for closure, cleanup responsibilities are transferred to the AFBCA.²⁰² The environmental restoration program is continued, but with slight changes to its focus or implementation. A BRAC Cleanup Team (hereinafter BCT) is assembled which conducts a "bottom-up review" of the environmental cleanup or compliance actions needed in support of property disposal and reuse.²⁰³ The BCT develops a BRAC Cleanup Plan that incorporates both reuse priorities and environmental cleanup concerns in order to promote faster transfers of property to the LRA.²⁰⁴ The BCT focuses on shared environmental decision-making and risk-taking; allowing for quicker cleanups based on the best data available, while still protecting human health and the environment.²⁰⁵

²⁰⁰ BASE CONVERSION HANDBOOK, *supra* note 54, at 1-88.

²⁰¹ AFBCA Fact Sheet #DI-4, *supra* note 192.

²⁰² BASE CONVERSION HANDBOOK, *supra* note 54, at 1-89.

²⁰³ DOD Guidance on Establishing Base Realignment and Closure Cleanup Teams, DOD BRIM, *supra* note 50, at F-5. See also 10 U.S.C. §2701 *et. seq.* (1998). Arising from President Clinton's pronouncement of a fast-track cleanup initiative on July 2, 1993, the BCT is comprised of a member of the military department, a representative from the state environmental regulatory entity, and where appropriate a representative from the U.S. Environmental Protection Agency. *Id.*

²⁰⁴ DOD Guidance on Establishing Base Realignment and Closure Cleanup Teams, DOD BRIM, *supra* note 50, at F-5. Potential areas for acceleration of the property transfer include: proper selection of applied technology, embracing actual cleanup, rather than continuous studying of sites, interfacing with the LRA, and identification of clean properties. *Id.* The BRAC Cleanup Plan is a phased plan which identifies and prioritizes requirements, schedules and costs associated with the cleanup and is subject to being updated when remediation occurs or the needs of the LRA change. *Id.* See also BASE CONVERSION HANDBOOK, *supra* note 54, at 1-89.

²⁰⁵ BASE CONVERSION HANDBOOK, *supra* note 54, at 1-91. On August 8, 1995, Air Force guidance was issued stressing the goals (1) of reducing cleanup costs by 25% by the year 2000 while complying with legally enforceable agreements and orders, (2) improving cleanup procedures, (3) developing action plans to meet all stakeholder needs, (4) expediting real estate reuse, and (5) improving contracting procedures. *Id.*

The BCT notifies the RAB of the environmental studies conducted and the proposed cleanup actions and the BCT will consider the reaction of the RAB to such proposed actions. The RAB may be described as holding an advisory role to the BCT.

Furthermore Air Force bases are required to perform an additional step of obtaining a Peer Review of Selected Remedial Technology for the cleanup plan.²⁰⁶ The peer review assesses the adequacy of the rationale used to select remedial actions, validates the technical merits of the proposed remedial actions, and provides recommendations or support for funding requests.²⁰⁷ This process promotes more effective, innovative and potentially cost-saving cleanup methods by weaning out inappropriate actions and it ensures remedial actions are consistent with the overall cleanup plan.²⁰⁸

F. Restoration Advisory Board.

Another mechanism for interaction between the AFBCA and the local community is the establishment of a Restoration Advisory Board (hereinafter RAB) or the reorganization of an existing board.²⁰⁹ Comprised of community, regulatory, and installation representatives, it serves as the focal point and information exchange center for environmental cleanup activities.²¹⁰ RAB members will provide advice to the BCT

²⁰⁶ BASE CONVERSION HANDBOOK, *supra* note 54, at 1-109.

²⁰⁷ BASE CONVERSION HANDBOOK, *supra* note 54, at 1-109. The peer review studies "site characterization information, including a conceptual site model and other background data, life cycle costs of the technology being considered, risk criteria, and cleanup goals as identified by the BCT." *Id.*

²⁰⁸ BASE CONVERSION HANDBOOK, *supra* note 54, at 1-109.

²⁰⁹ DOD Guidance on Improving Public Involvement in Environmental Cleanup at Closing Base, DOD BRIM, *supra* note 50, at 2-10 and F-12. See also U.S. Environmental Protection Agency and DOD Restoration Advisory Board Implementation Guidelines, DOD BRIM, *supra* note 50, at F-45; 10 U.S.C. §2705(f); and Proposed Rules for DOD Restoration Advisory Boards (32 CFR Part 202), 61 Fed. Reg. 40764 (1996).

²¹⁰ DOD BRIM, *supra* note 50, at 2-10.

decision-makers on risk-based remediation and restoration issues and complements the establishment of other community relationship endeavors.²¹¹

G. U.S. Environmental Protection Agency - Early Transfer Guidance.

On June 16, 1998, EPA issued guidance for reviewing requests from the federal government for the transfer of contaminated property.²¹² The guidance applies where the federal government seeks a deferral for the covenant mandating “that all remedial action necessary to protect human health and the environment with respect to any [hazardous] substance remaining on the property has been taken before the date of transfer” and that “any additional remedial action found to be necessary after the date of the transfer shall be conducted by the United States.”²¹³

The federal agency must notify both EPA and the Governor of the State wherein the property rests of its intent to request a Covenant Deferral Request (hereinafter CDR).²¹⁴ After a draft CDR is prepared, it is made available for public comment and then the final CDR is submitted to the EPA Regional Office and State representative for

²¹¹ *AFBCA Fact Sheet #CP/ER-2* (last modified Nov. 1, 1997)

<<http://www.afbca.hq.af.mil/factshts/index.htm>>.

²¹² *EPA Guidance on the Transfer of Federal Property by Deed Before All Necessary Remedial Action Has Been Taken Pursuant to CERCLA Section 120(h)(3)*, (visited Mar. 4, 1999)

<<http://www.epa.gov/swerffrr/doc/earlytrans.htm>>. It applies to property listed on the National Priorities List where all necessary remedial action has not yet been taken and its transfer is to a non-federal entity, and does not apply to uncontaminated property or transfers to federal entities. *Id.*

²¹³ *Id.*

²¹⁴ *Id.* Both EPA and the State participates in the development and review of a draft CDR. In accordance with §120 the federal agency must publish a notice in the local newspaper identifying the specific property, its intended use, the authority for early transfer, the fact the property is on the NPL, notice that the environmental condition will be evaluated, a summary of the decision-making process, name and number of the agency office handling the CDR, and the 30-day comment period. *Id.*

their review.²¹⁵ The federal agency's CDR must be thorough and comply with EPA's requirements.²¹⁶

Four requirements must be met before the EPA affirmatively determines the property is suitable for transfer:

1. The transferee's intended use of the property is suitable and is consistent with the protection of human health and the environment;
2. The conveyance instrument contains adequate CERCLA Response Action Assurances;
3. The federal agency has provided public notice of the proposed transfer and established a 30-day public comment period; and
4. The deferral and transfer of the property will not substantially delay any necessary response action.²¹⁷

²¹⁵ *Id.* All public comments are included in the record, but not addressed unless worthy of notice and most times no comments are received. Interview with Brent Evans, *supra* note 161.

²¹⁶ *Id.* The CDR must include: a complete legal description of the property; a description of the nature and extent of the contamination. (Note: EPA's preference is for a completed Remedial Investigation for the specific parcel of land, however the federal agency may demonstrate why a RI is not necessary. EPA is also encouraged to consider the "degree of uncertainty regarding the nature and extent of contamination; the future use of the property...; who is to perform future work; and any existing information or data on the parcel under consideration."); a description of the "intended land use during the deferral period and an analysis of whether the intended use is reasonably expected to result in exposure to CERCLA hazardous substances at sites where response actions have not been completed. This analysis should be based on the environmental condition of the property and should consider the contaminant(s), exposure scenarios, and potential and actual migration pathways that may occur during the future use;" results from a CERCLA risk assessment. (Note: EPA recognizes a presumption that the CDR includes these results because of requirements under the National Contingency Plan and EPA guidance. It will, however, provide an opportunity to the federal agency to demonstrate why a risk assessment does not have to be completed. In determining whether a completed risk assessment is needed, EPA considers "the degree of uncertainty regarding the potential risks posed by the contamination; existing analyses; certainty about future use; and who is conducting the response."); a description of any response or corrective action, "including a projected milestone date for the selection and completion of the action, and/or projected date for the demonstration that a remedial action is operating properly and successfully"; CERCLA notice and covenant language, and CERCLA response action assurances. The required CERCLA notice is identified at §120(h)(1) and (3) and 40 CFR Part 373. The additional remedial action covenant as required by §120(h)(3)(A)(ii)(II). The right of government access for investigative, response, or corrective action necessary after the transfer as required by §120(h)(3)(A)(iii). The Response Action Assurances must provide for restrictions on the use of the property as needed, that a response action will be taken, and provide that sufficient funding will be available to the federal agency via budget requests or current appropriations; a responsiveness summary (e.g. responses to comments from public and regulatory agencies), and the transferee's response action assurances and agreements in the deed. In the event the transferee agrees to conduct a response action on the property, then EPA receives a copy of the legally binding documentation describing the transferee's obligation, namely to conduct cleanup in accordance with CERCLA and the National Contingency Plan. EPA must also receive assurances of the transferee's technical and financial capacity to execute the response action from the federal agency owning the property. *Id.*

²¹⁷ *Id.* The transfer of any property must await the explicit deferral by EPA and the State and although not statutorily required, it is EPA policy to establish a signed Interagency Agreement as a prerequisite to a covenant deferral. *Id.*

V. Mechanisms for Protecting Human Health and the Environment.

A. Institutional Controls.

Institutional controls are structural or legal mechanisms used to limit access to, or restrict the use of property in order to protect the general public from exposure to residual contamination or to protect the integrity of an engineering control intended to contain contamination.²¹⁸ The type of institutional control imposed may be categorized as either a proprietary control or a governmental control.²¹⁹

A proprietary control is a private contractual mechanism contained in the deed or lease of the transferred property and may consist of an easement,²²⁰ covenant,²²¹ or reversionary interest on the land.²²² In contrast, a governmental control is a restriction imposed by state or local governments under of their police power authority. Governmental controls may be imposed by zoning or permit programs.²²³

²¹⁸ *Institutional Controls* (visited Jun. 29, 1999) <<http://www.dtic.mil/envirodod/brac/ic.html>>. Although generally considered a means of protecting human health, they are also used to protect historic buildings, wetlands, and endangered species. See *A Guide to Establishing Institutional Controls at Closing Military Installations* (visited Jun. 29, 1999) <<http://www.dtic.mil/envirodod/brac/icguide.html>>. Examples of institutional controls are deed restrictions, land use planning, zoning, and siting control, easements, monitoring, recordkeeping, deed notices, and resource use limitations. John A. Pendergrass, *Institutional Controls: Safety Net for Land Use Based Cleanups*, SC27 ALI-ABA 399, 403 (1977).

²¹⁹ *Institutional Controls*, *supra* note 218.

²²⁰ *Institutional Controls*, *supra* note 218. An easement allows the holder to use the land of another, or to restrict the uses of the land, ...and [i]f the owner violates the easement, the holder may bring suit to restrain the owner." *Id.* There are four sub-categories of easements: "(1) easement 'appurtenant' that provides a specific benefit to a particular piece of land; (2) easement 'in gross' benefits an individual or company; (3) an affirmative easement allows the holder to use another's land in a way that, without the easement, would be unlawful; and (4) a negative easement prohibits a lawful use of land." *Id.*

²²¹ *Institutional Controls*, *supra* note 218. "A covenant is a promise that certain actions have been taken, will be taken, or may not be taken... [and] can bind subsequent owners of the land." *Id.*

²²² *Institutional Controls*, *supra* note 218. "A reversionary interest place a condition on the transferee's right to own and occupy the land [and] if the condition is violated, the property is returned to the original owner or the owner's successors." *Id.*

²²³ *Institutional Controls*, *supra* note 218.

Institutional controls are provided for by CERCLA §120(h)(3) and the National Contingency Plan²²⁴ and are a common tool in the transfer of contaminated property at realigned or closed bases. The advantage to using institutional controls are primarily their cost-savings because cleanup standards can be reduced based on a restricted intended future use of the property. However, controls are also used when there is no feasible remedy for a contaminated site, or at a base closure site when the time required to remediate may hinder the development of the property.²²⁵

DOD recommends the LRA consider whether the need for institutional controls exists, as early in the planning stage for its redevelopment plan, and if so, what kind is needed, the identification of the implementation and maintenance requirements of the controls selected, and any funding requirements.²²⁶ Special attention must be given to the specific requirements or limitations of state and local law for institutional controls because each jurisdiction may differ, and consequently the legality and enforceability of the institutional control may be threatened.²²⁷

It must also be recognized that institutional controls are not perfect. Nor can they be made to be perfect as they may be forgotten over time, enforcement agencies may not effectively review properties or land users' actions to prevent a breach of the control, or

²²⁴ CERCLA §120(h)(3). See 40 C.F.R. §300.430(a)(1)(iii)(D). Although recognized by environmental statutes, mechanisms to enforce land use controls are "rooted in real estate law." *DOD Developing Comprehensive Land Use Controls Guidance For BRAC Sites*, DEFENSE ENVIRONMENT ALERT, 9 (Jan. 26, 1999).

²²⁵ *A Guide to Establishing Institutional Controls at Closing Military Installations*, *supra* note 218. All institutional controls can fail, for example: signs that are unreadable because of illiteracy or language barriers, budget reductions, office relocations, amendments to zoning laws, rezoning, or the granting of variances. See John A. Pendergrass, *supra* note 218, at 409.

²²⁶ *A Guide to Establishing Institutional Controls at Closing Military Installations*, *supra* note 218. Discussions and a description of the nature of intended restrictions are incorporated in the Feasibility Study and the final details, to include engineering plans, zoning plans are incorporated in the Remedial Design for the contaminated site. *Id.* The public also has an opportunity to comment because community acceptance is a criteria for selecting a CERCLA remedy. See 40 C.F.R. §300.430(a)(1)(iii).

²²⁷ *A Guide to Establishing Institutional Controls at Closing Military Installations*, *supra* note 218.

land users may simply take their chances and violate them.²²⁸ To enhance the effectiveness of institutional controls the Defense Environmental Response Task Force (hereinafter DERTF) recommended that broad, sufficient, and continuing notice be provided.²²⁹ With respect to enforcement of the controls, a cooperative approach among federal, state, and local governments is seen as the most reliable.²³⁰

Because of the increased use of institutional controls in 1997 the DERTF passed a resolution stating that "DOD should not transfer any property with institutional controls unless DOD first makes a determination that any necessary institutional controls are sufficiently enforceable in the relevant jurisdiction to ensure protection of human health and the environment with respect to such site."²³¹ This statement was considered a response to growing "fears that federal facilities may apply institutional controls on property it is transferring without the necessary enforcement mechanisms."²³² Concern was expressed by some critics that since "deed restrictions are typically only enforceable by those parties in the chain of title for a piece of property, [consequently] state or federal environmental regulators would not have any jurisdiction for enforcement of deed restrictions."²³³ Subsequently, the DERTF recommended that "DOD policy be developed on stakeholder input to institutional controls decisions and a DOD study be initiated that

²²⁸ *Report of the Future Land Use Working Group to the Defense Environmental Response Task Force, Making Institutional Controls Effective*, Sep. 19, 1996 (visited Jun. 29, 1999) <<http://www.dtic.mil/envirodod/brac/icrec826.html>>.

²²⁹ *Id.* Other suggested improvements for ensuring notice is the establishment and long-term resourcing on the part of Federal, State and local government to regularly monitor and track changes in land use and the setup of a national registry of BRAC installations using institutional controls. *Id.*

²³⁰ *Id.*

²³¹ *DOD Advisory Board Seeks Enforcement of Institutional Controls* (visited Jun. 27, 1999) <<http://osiris.cso.uiuc.edu/denix/DOD/News/Pubs/DEA/02Jul97/20.doc.html>>. The Defense Environmental Response Task Force advises Congress and DOD on ways to improve environmental cleanup at closing bases. *Id.*

²³² *Id.* Although not identifying its sources, the article stated that "recent studies on the topic found that such controls 'may not be sufficiently enforceable in all states,'" and citing to deed restrictions in Alabama lasting for only 50 years as an example. *Id.*

compares the life-cycle costs of using such controls with full cleanup,"²³⁴ in order to better calculate their impact and effectiveness.²³⁵ With gathering recognition that institutional controls are here to stay because complete elimination of contamination is not feasible, representatives from the environmental, legal, developer and local government communities are advocating comprehensive institutional controls implementation and enforcement guidance at the national or DOD level.²³⁶ They do however agree that in some circumstances, such as when "cleanup is technically impracticable, disruptive to an ecosystem, or when the results of cleanup are uncertain and/or extremely costly," institutional controls may be the best remedy choice.²³⁷

1. Maintenance of Controls.

A first-of-its-kind set of Memoranda of Agreement (hereinafter MOA) involving three separate navy installations was signed on August 31, 1998, by representatives of the

²³³ *Id.*

²³⁴ *Institutional Controls Flawed But Here to Stay, Critics Say* (visited Jun. 27, 1999)

<<http://osiris.cso.uiuc.edu/denix/DOD/News/Pubs/DEA/29Jul98/09.doc.html>>. There is a recognized lack of data on the life cycle costs or in-perpetuity costs of institutional controls. *Id.* In its recommendation, the DERTF requested a comparison of costs between institutional control costs and cleanup costs for unrestricted use. *Id.*

²³⁵ *Id.*

²³⁶ *Id.* Groups represented were the Center for Public Environmental Oversight, DOD, DERTF, the National Association of Installation Developers, the Environmental Law Institute, Arc Ecology, and the General Services Administration. *Id.* The Center for Public Environmental Oversight and Arc Ecology are non-governmental organizations. *Id.*

²³⁷ *Id.* The article described the disagreement that arises between state and local officials as to who should enforce institutional controls; whether it be the legal authority, the funding capability or trained personnel. *Id.* Others, such as the DOD deputy general counsel, question whether it should be the responsibility of environmental regulators. *Id.* Ms. Eve Bach, an economist/planner with Arc Ecology proposed a new approach that identifies six characteristics that should be included in developing the design specifications of institutional controls: (1) anticipate potential breaches of land use controls; (2) identify who should know that land use is restricted at the site and how that information should be conveyed; (3) provide feedback loops by knowing which agency is most likely to become aware of violations and how and when the agency is likely to discover violations; (4) provide for enforcement by identifying the responsible agency, the remedies available, and the penalties available, but still reduce counterproductive litigation; (5) develop a contingency plan in the event enforcement does not occur or new contamination treatments become available; and (6) ensure adequate resources for enforcement or treatment options. *See New Framework Needed for Institutional Controls, Environmentalist Says* (visited Jun. 27, 1999). <<http://osiris.cso.uiuc.edu/denix/DOD/News/Pubs/DEA/29Jul98/10.doc.html>>.

Navy, U.S. EPA and Florida environmental regulators.²³⁸ Each MOA outlines the means by which the Navy will guarantee maintenance of land use controls in cleanup remedies and in the MOAs the Navy agreed to obtain regulator concurrence on any major land use changes for property with imposed land use controls, to conduct quarterly visual inspections, and develop plans for maintenance of the land use controls.²³⁹ Under the agreements both U.S. EPA and the Florida Department of Environmental Protection must be notified 30 days in advance of the intended visual inspections to afford the regulators an opportunity to observe. All inspections must be recorded and an annual report must be forwarded to the named regulatory agencies. If land use changes are contemplated, then the Navy must provide at least 60 days notice and receive their concurrence before enacting the change. For property transfers to entities outside Navy control, 60-day notification must also be given.²⁴⁰

2. Recommended Improvements.

The International City/County Management Association (hereinafter ICMA), a not-for-profit organization that assists local governments and communities in redeveloping realigned or closed military bases, developed six recommendations for improving local government's use of institutional controls at contaminated sites. The ICMA's recommendations are:

- (1) Minimize reliance on such controls;
- (2) Clarify jurisdictional issues and improve coordination between state and local governments;

²³⁸ *Navy Signs Land Use Controls Guarantee with EPA and Florida* (visited Jun. 27, 1999) <<http://osiris.cso.uiuc.edu/denix/DOD/News/Pubs/DEA/23Sep98/20.doc.html>>. Naval Air Station Jacksonville, Naval Air Station Key West and Naval Station Mayport are those affected by the MOA. *Id.*

²³⁹ *Id.* The MOAs define land use controls to include fences, caps or security guards, night lighting, drilling water wells restrictions, as well as land use controls. *Id.* After the development of a list of sites at the three naval installations, the list is required to be updated at least quarterly. *Id.*

²⁴⁰ *Id.*

- (3) Provide training and education to local governments regarding the role and use of institutional controls;
- (4) Improve the quality and usage of recording such controls;
- (5) Improve the longevity of institutional controls; and
- (6) Improve and increase enforcement efforts by increasing enforcement resources.²⁴¹

The ICMA's recommendations arose out of concern from results of an informal survey that highlighted the lack of notification of and by local or state agencies, reliance on institutional memory for future enforcement, lack of regularly scheduled inspections to ensure compliance, and the reliance on citizen complaints to trigger enforcement.²⁴²

The Environmental Law Institute has also suggested improving the use of institutional controls by applying three principles: redundancy, publication and education, and planning for human variability.²⁴³

3. Future Prospects/Policy.

Announced in January 1999, the DOD is developing guidance on land use controls at closing military bases with the goal of identifying the controls and establishing procedures to ensure their effectiveness.²⁴⁴ The guidance will only apply to property transferred out of federal controls from pre-transfer through post-transfer stages.²⁴⁵

²⁴¹ *ICMA Seeks Institutional Controls Policy for Local And State Governments*, DEFENSE ENVIRONMENT ALERT, 1, 18 (Feb. 10, 1998).

²⁴² *Id.*

²⁴³ See John A. Pendergrass, *supra* note 218, at 409-410. Redundancy is applied by (1) the layering of controls; (2) designing controls that would operate on different populations or time frames; and (3) implementing controls that require both passive and active administration by human institutions. *Id.* The latter two are self-explanatory. The Environmental Law Institute also affirmed that institutional controls can be useful tools for managing risk, but they cannot eliminate risk. *Id.*

²⁴⁴ *DOD Developing Comprehensive Land Use Controls Guidance For BRAC Sites*, *supra* note 224, at 9. The guidance was developed in coordination with the Armed Services and the General Services Administration. *Id.*

²⁴⁵ *Id.*

In May 1999, the U.S. EPA announced issuing its own interim guidance on institutional controls for realigned or closed bases.²⁴⁶

This new guidance, "Institutional Controls and Transfer of Real Property under CERCLA §120(h)(3)(A)(B), or (C)" provides strict requirements for institutional controls. It also gives U.S. EPA the final authority to approve or disapprove the controls on the basis that they are or are not adequate to support federal transfer of the property to non-federal entities.²⁴⁷

B. Environmental Insurance.

Notwithstanding the CERCLA §120(h)(3) covenants imposed upon the federal government at closed or realigned bases, and the protections afforded by the indemnity clause of §330, as discussed earlier, some critics still caution transferees and developers of the remaining liability risks.²⁴⁸ To many in the development business, the environmental protection provided by the military is not enough, because the provisions also invoke liability clauses of other potentially responsible parties and contributors.²⁴⁹ Consequently, transferees in accepting contaminated property are still exposed to business and environmental risks.

At base closure locations, the military required a proposed recipient to have contracted for remediation, with the necessary performance and labor and supplies' bonds, prior to the effectuation of the transfer.²⁵⁰ After the transfer, the recipient may, in

²⁴⁶ *Despite DOD Criticisms, EPA Will Issue Interim Closing Base IC Policy*, (visited Jun. 3, 1999) <http://osiris.cso.uiuc.edu/denix/DOD/News/Pubs/DEA/05May99/01.doc.html>>.

²⁴⁷ *Id.*

²⁴⁸ Barry Steinberg, Esq., *Is Environmental Insurance Necessary?*, ICMA BASE BULLETIN, 4 (Sep./Oct. 1998). Recall that §330 of NDAA-FY93 states the DOD will indemnify and defend the LRA and its sublessees from any claim related to releases of hazardous substances from military activities on closed or realigned properties. See NDAA-FY93, *supra* note 191.

²⁴⁹ Steinberg, *supra* note 248, at 4.

²⁵⁰ Interview with Barry Steinberg, Esq., Kutak Rock, at Washington, D.C. (May 25, 1999).

the process of redeveloping the site, uncover more of the known contamination than expected, or uncover known contamination, but of a different characterization, or uncover previously unknown contamination at the site, all of which, requires cleanup.²⁵¹ Any of those situations could result in unanticipated cost-overruns for the transferee.²⁵² Although the early transfer deed contained the military's assurances that it will return to cleanup the site, there are not only no assurances as to the timing of the cleanup, and any such cleanup actions are usually contingent on the availability of funding.²⁵³

Furthermore, transferees may be vulnerable to litigation delays and other expenses if the military asserts that the newly discovered contamination in question was either not there prior to the transfer, or was caused by the transferee.²⁵⁴ During the time needed to resolve any contested issues, impose responsibility, and complete the cleanup, the transferee may continue to incur costs while unable to continue work on the development project.²⁵⁵

In such circumstances there is an environmental liability risk that LRAs and developers, as transferees of contaminated property, may want to manage using Environmental Impairment Liability insurance.²⁵⁶

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ Steinberg, *supra* note 248, at 4.

²⁵⁴ Steinberg, *supra* note 248, at 4.

²⁵⁵ *Id.* Costs incurred include payroll obligations, machinery rentals, and interest. *Id.* However, the law remains unclear whether a developer may file a claim under §330 of NDAA-FY93 for reimbursement of business interruption costs. Steinberg, *supra* note 250. Yet another common situation that may expose a LRA and sub-lessee to environmental liability occurs when the military leases property, with excavation restrictions, to the LRA and the LRA then sub-leases the property only to have the sub-lessee violate any restrictions and exposing contamination at the site. In that instance, both the LRA and sub-lessee could be held accountable for violating the lease and for cleaning up the site, which could be an expensive endeavor. Gregory F. Hurley and John Schack, *Opportunities & Risks at Closing Military Properties*, Averbek Environmental (unpublished). Such restrictions may also be written in deeds. *Id.*

²⁵⁶ *Id.* Adding to that uncertainty of future liability is the alleged insufficient or inadequate foundation of the environmental assessment of the property via an EBS or lack of extensive data on the environmental conditions of the property. See Steinberg, *supra* note 248, at 4.

Environmental Impairment Liability insurance is a fairly recent phenomenon.

Prior to its development, Comprehensive General Liability (hereinafter CGL) insurance policies covered most environmental liabilities, but subsequent changes limited the scope of their coverage.²⁵⁷ Rising costs associated with pollution damage in the early 1970s caused the insurance industry to insert a pollution exclusion clause in their policies.²⁵⁸ The pollution exclusion clause denied coverage for bodily injury or property damage resulting from the actual or threatened discharge of pollutants, and did not cover losses, costs, or expenses arising from governmental direction or request for testing, monitoring, remediation, removal or treatment of pollutants.²⁵⁹

In 1979, Environmental Impairment Liability was specifically created to cover environmental damages.²⁶⁰ Currently five insurers offer various policies to allocate and

²⁵⁷ 2 ELIZABETH GLASS GELTMAN, ENVIRONMENTAL ISSUES IN BUSINESS TRANSACTIONS, 478 (1994). CGL policies were first standardized in about 1941 and again in 1966 and typically "covered bodily injury and property damage 'caused by accident.'" *Id.* The courts ruled that such policies "covered unintended injury or damage resulting from, among other things, extended exposure to pollutants," to include gradual pollution. *See New Castle Co. v. Hartford Acc. and Indem. Co.*, 933 F.2d 1162, 1196-97.

²⁵⁸ Geltman, *supra* note 257, at 478.

²⁵⁹ Hurley and Schack, *supra* note 255. However, coverage was not barred if the pollutant discharge was "sudden and accidental." Geltman, *supra* note 257, at 478. Issues open to interpretation and litigation under CGL insurance policies involve: (i) the obligation of an insurer to defend an insured, including triggering events, such as a lawsuit or other coercive or adversarial action against the insured; (ii) the term 'damages' ..., including the application to response or cleanup costs; (iii) the term 'property damage' ..., including the application to response costs; (iv) the term 'occurrence', which event causes damage, and triggering events, such as when the damage is discovered, when exposure to a pollutant occurs, when actual injury occurs, and a continuous trigger; (v) the 'pollution exclusion' clauses; and (vi) the 'owned property' exclusion." *Id.* at 482. After an environmental law has imposed liability, it is state law that governs the interpretation of insurance contracts and their coverage. *Id.* at 482. Some CGL policies extended the clause further by denying coverage for "bodily injury, personal injury, or property damage arising out of pollution or contamination caused by the discharge or escape of any pollutants or contaminants." *Id.* at 519. This is called the "total pollution exclusion." *Id.*

²⁶⁰ Hurley and Schack, *supra* note 255. A typical definition of 'environmental impairment' means any one or a combination of the following: (a) emission, discharge, dispersal, disposal, release, escape, or seepage of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; (b) The generation of odor, noises, vibrations, light, electricity, radiation, changes in temperature or any other sensory phenomenon; arising out of or in the course of the insured's operations, installations or premises,...provided (a) or (b) is not sudden and accidental." Geltman, *supra* note 257, at 531 n. 221. In 1982 there were 15 companies offering this type of insurance, in 1985, there were three companies. Telephone Interview with John Schack, Averbek Environmental (May 25, 1999).

manage the transferee's or developer's environmental risk.²⁶¹ Under these policies the developers can set a premium cost and deductible into its liability equation and have the cost of cleanup amortized over the life cycle of the project.²⁶² Unlike standard homeowners' insurance policies, environmental insurance policies are written and refined for each specific site after an extensive risk assessment is completed along with calculations needed to match the liability risk with the cost of a suitable premium.²⁶³

Although each insurance carrier may identify their products differently, the type of policies available generally cover the following: third-party liability claims for bodily injury and property damage, business interruption, cleanup cost cap, contractor's pollution liability, first-party cleanup, legal liability for pollution, and liability for professional errors and omissions.²⁶⁴ The insurance industry is still wrestling whether to

²⁶¹ Telephone Interview with John Schack, *supra* note 260. It has also been noted that the military departments have voiced a willingness to cover the expense of environmental insurance by means of economic development conveyances, but to date none have actually paid for such policies. See Barry Steinberg, Esq. *The Future of Environmental Insurance*, ICMA BASE BULLETIN, 5, 11 (Sep./Oct. 1998).

²⁶² Steinberg, *supra* note 261, at 7. The insurance companies are more cash-ready to cover newly discovered contamination, and it is the insurer who then would be recouping its costs, when able, from the federal government, freeing the transferee to continue its development project. *Id.* at 7. It may also encourage or support investment or financial backers to the property. *Id.* at 7.

²⁶³ Steinberg, *supra* note 261, at 7. Coverage is usually provided under the policy active at the time a claim is asserted; is limited to claims occurring on or after the policy's retroactive date; is limited to accidental or unintended acts; covers conditions that are undetected at the time of the policy's effective date; is responsive to federal and state environmental regulations; establishes minimum premiums and deductibles; may be transferable from one party to another for a specific project or property; and can be provided to any party that has a legitimate insurance interest. See *The Application of Environmental Insurance in Transfers of DOD Property*, ICMA BASE BULLETIN, 14, 16 (Nov./Dec. 1997). "In the case of the transfer of closed military installations, the new and subsequent owners of the property, the lender, and the contractors and subcontractors performing work at the facility all have an insurable interest and can be included in the coverage. If they have a legitimate insurance interest, municipalities and local governments are insurable." *Id.* at 16.

²⁶⁴ *The Application of Environmental Insurance in Transfers of DOD Property*, *supra* note 263, at 15. Within those general categories environmental insurance covers: off-site cleanup of pre-existing or new conditions triggered by a third-party claim; unknown pre-existing contamination; known pre-existing contamination; new contamination; and business interruption losses may extend to gross earnings or rental income and extra expenses; and the cleanup cost cap covers remediation cost overruns for actual contamination greater than estimated; offsite cleanup costs adjacent to the covered site; offsite cleanup costs emanating from the covered site; and change orders required by the government and incurred during the term of the policy. Telephone Interview with John Schack, *supra* note 260. Additionally, premium discounts are available if the insured elects to share in cost overruns. *Id.*

offer coverage for additional remediation costs incurred from changes in environmental standards or changes in the reuse plans.²⁶⁵

Before insuring a LRA or developer, the insurance underwriter thoroughly and rigorously evaluates the nature and extent of the contamination, the approved remedial design plans, projected cost data and regulatory correspondence.²⁶⁶ The end result of this process may reduce the risk involved in taking ownership of the property.²⁶⁷ Another benefit derived from environmental insurance may be the “buyer’s ability to obtain sufficient financing for the purchase of property and redevelopment projects. Because of the liberal definition of a responsible party under CERCLA, many financial institutions look very closely at environmental exposures in their lending activities. By naming the financial institution as an additional insured, it would reduce that institution’s potential liability associated with that transaction.”²⁶⁸

From the military’s standpoint, environmental insurance is an added benefit and protection against incurring additional cleanup costs.²⁶⁹ Additionally, the military in

²⁶⁵ *The Application of Environmental Insurance in Transfers of DOD Property*, *supra* note 263, at 20. Current policies stipulate compliance with environmental standards and regulations in force at the inception of the policy. *Id.* However, most Environmental Impairment Liability policies exclude coverage for claims made that were clearly imminent prior to inception of coverage. The policies require that the insured must not have known or not reasonably foreseen that the claim would be made. Geltman, *supra* note 257, at 531.

²⁶⁶ Hurley and Schack, *supra* note 255. “The final cleanup costs will be based upon the actual amount and type of contamination; the characteristics of the surrounding environment; the reliability of the selected remediation action plan for the site; and the willingness of the controlling governmental authorities to accept the remediation as completed.” Ken Radigan, CPCU, ARM, Commerce and Industry Insurance Company (Risk Financing, by International Risk Management Institute, Inc.) (Supp. Oct. 1996). The higher the uncertainty of environmental exposure the more difficult it becomes to obtain favorable financing. Steinberg, *supra* note 261, at 4.

²⁶⁷ *The Application of Environmental Insurance in Transfers of DOD Property*, *supra* note 263, at 15. The “insurability of a certain piece of property therefore would enhance its attractiveness to the buyer or potential transferee.” *Id.* at 15.

²⁶⁸ *The Application of Environmental Insurance in Transfers of DOD Property*, *supra* note 263, at 15. Environmental insurance has also been hailed as a tool for managing cash flow by a developer or business entity as the “policy can be structured to ‘pay on behalf’ of the insured, and the insurers will start paying for expenses once a claim has been reported, ... [thus] provid[ing] a buffer to soften the immediate effect of the claim on a company’s cash flow.” *Id.* at 20.

²⁶⁹ Interview with Steinberg, *supra* note 250.

seeking designation as an additional insured protects itself against the insurer's claim for subrogation; a win-win situation for the military.²⁷⁰

Environmental insurance has also been hailed by the insurance community as a means for the military to cap its costs, potentially lower cleanup costs, and accelerate property transfers.²⁷¹ It has been proposed that the military establish an interest-bearing account to cover cleanup costs at each base closure and realignment site by using an insurance contract.²⁷² The military pays a premium to the insurance company and in return the insurance company matches the original contribution if cleanup costs exceed the funds in the account.²⁷³

VI. Case Studies – Early Transfer Deeds.

A. Grissom Air Force Base.

Selected for realignment in 1991 and closed in September 1994, Grissom Air Force Base comprised 2,722 acres in an agricultural area of central Indiana.²⁷⁴ The base was originally established as a naval air station that was deactivated for several years and then reactivated to support air refueling operations.²⁷⁵

²⁷⁰ *Id.*

²⁷¹ Steinberg, *supra* note 261, at 5.

²⁷² Steinberg, *supra* note 261, at 5. It was also proposed that for extensive cleanups, the military could annually place a certain amount of money in an account for a number of years, and in the event cleanup costs exceed that year's allotted amount, the insurance company would cover the costs and seek reimbursement from the military in the subsequent year. *Id.* at 5.

²⁷³ Steinberg, *supra* note 261, at 5. Another perceived benefit is that the LRAs could draw from the interest bearing account to clean the site, rather than wait for the military to finish the cleanup. *Id.*

²⁷⁴ *Case Studies on Selected Bases Closed in 1988 and 1991*, General Accounting Office, NSIAD-95-139, 61 (Aug. 1995). There were no sites at Grissom Air Force Base on the National Priorities List. *Id.* It is located 78 miles north of Indianapolis, Ind. See Cheri L. Peele, *Early Transfers of Contaminated Military Property to Local Redevelopment Authorities: Implications for Base Redevelopment* (1998) (Master in City Planning thesis, Massachusetts Institute of Technology).

²⁷⁵ *Case Studies on Selected Bases Closed in 1988 and 1991*, *supra* note 274, at 61.

As part of the redevelopment plan, the Air Force retained about 1,398 acres, including the airfield for the Air Force Reserves.²⁷⁶ The remaining property was slated for transfer by an economic development conveyance or public sale.²⁷⁷ Formed in March 1992, the Grissom Redevelopment Authority (hereinafter GRA), is the LRA.²⁷⁸ It is financed by grants from the Office of Economic Adjustment, the State of Indiana, and surrounding local communities.²⁷⁹

The GRA completed and received approval for its Community Reuse Plan in April 1993 which called for a mix of aviation, office, industrial, commercial, and warehouse uses.²⁸⁰ Shortly thereafter, the GRA signed a long-term lease covering 901 acres through an economic development conveyance.²⁸¹

In early 1996, the GRA filed an application with the State of Indiana for siting of a medium-security state prison on a 201-acre parcel.²⁸² The application was approved in March 1996.²⁸³ As a prison, the State of Indiana could receive the property at no cost pursuant to a public benefit conveyance, but timing of the transfer was critical.²⁸⁴ The State of Indiana needed to own the site no later than July 1, 1997, in order to secure a low bond rate for the prison's construction.²⁸⁵ Failure to meet that deadline would cause the relocation of the prison to another site.²⁸⁶

²⁷⁶ *Case Studies on Selected Bases Closed in 1988 and 1991*, *supra* note 274 at 61.

²⁷⁷ *Case Studies on Selected Bases Closed in 1988 and 1991*, *supra* note 274 at 61.

²⁷⁸ *Case Studies on Selected Bases Closed in 1988 and 1991*, *supra* note 274 at 61.

²⁷⁹ Cheri L. Peele, *supra* note 274, at 29.

²⁸⁰ Cheri L. Peele, *supra* note 274, at 29.

²⁸¹ Interview with Derence V. Fivehouse, General Counsel, AFBCA, at Arlington, Va. (May 21, 1999).

²⁸² Cheri L. Peele, *supra* note 274, at 29.

²⁸³ Cheri L. Peele, *supra* note 274, at 30.

²⁸⁴ For consideration of one dollar the property was later transferred to the State of Indiana by quitclaim deed. See *Text: Agreement Sanctioning First Early Transfer of Contaminated Military* (visited Jun. 3, 1999) <<http://osiris.cso.uiuc.edu/denix/DOD/News/Pubs/DEA/16Jul97/20.doc>.html.

²⁸⁵ Cheri L. Peele, *supra* note 274, at 30.

²⁸⁶ Cheri L. Peele, *supra* note 274, at 30. It had been the Air Force's intention to lease the land in furtherance of conveyance because of the need for environmental cleanup at the site. *Id.* at 30. The Air

At about the same time as the proposal for a prison was garnering support, the Base Transition Coordinator forwarded a letter to the State of Indiana describing the early transfer authority being studied in Congress.²⁸⁷ Once the authority was passed, the Governor of Indiana requested the early transfer of the 201-acre parcel.²⁸⁸ This became the first early transfer negotiated by either DOD or the Air Force and was initiated before the U. S. Environmental Protection Agency issued its guidance.²⁸⁹

To ensure protection of human health and the environment in the early transfer a risk evaluation was conducted at the site that included groundwater testing. Initial results revealed heavy metals that exceeded Maximum Contaminant Levels of the Safe Drinking Water Act.²⁹⁰ However it was unclear whether the samples exceeded local background levels for heavy metals.²⁹¹

Negotiations among representatives of the AFBCA, the Indiana Department of Environmental Management, the Indiana Department of Corrections, and the Governor's office became rather contentious over the groundwater testing results. The Indiana Department of Environmental Management's position was that the property was not suitable for transfer because of incomplete environmental data and the presence of heavy

Force had also been concentrating its efforts on cleanup at other areas that seemed to be of greater interest to the GRA. *Id.* at 30.

²⁸⁷ Cheri L. Peele, *supra* note 274, at 31. Significant advantages are the long-term benefit of being the property owner for obtaining better financing terms, less administrative oversight by the Air Force, and legally binding assurances that environmental cleanup by the Air Force would later occur. Interview with Derence V. Fivehouse, *supra* note 281.

²⁸⁸ Cheri L. Peele, *supra* note 274, at 31. Since the amendment of CERCLA §120(h)(3) by NDAA-97, it was the first time a governor requested the use of an ETD. *See Indiana Governor Approves First 'Early' Transfer of Military Property* (visited Jun. 3, 1999)

<<http://osiris.cso.uiuc.edu/denix/DOD/News/Pubs/DEA/16Jul97/19.doc.html>.

²⁸⁹ Interview with Derence V. Fivehouse, *supra* note 281.

²⁹⁰ Interview with Derence V. Fivehouse, *supra* note 281.

²⁹¹ Cheri L. Peele, *supra* note 274, at 31. The heavy metals consisted of cadmium and arsenic. Interview with Derence V. Fivehouse, *supra* note 281.

metals in the groundwater.²⁹² Subsequent meetings and the support of the Governor's Office persuaded the regulators to adopt the approach of managing the environmental risk, rather than seeking to eliminate all risk prior to the property transfer.²⁹³ The AFBCA agreed to include restrictions in the deed to prohibit the use of groundwater for drinking, to clear unexploded ordnance from the site, and to fence off the munitions burn burial area until investigation and remediation were complete.²⁹⁴

The AFBCA published public notice of the proposed early transfer to the State of Indiana on May 23, 1997, however no public comments were received within the 30-day comment period.²⁹⁵

On June 24, 1997, the FOSET, Supplemental Environmental Baseline Survey, an Agreement for Transfer of Real Property Between the Air Force and the State of Indiana, a Quitclaim Deed, and proposed findings were forwarded to Frank O'Bannon, Governor of Indiana for his review and approval of the early transfer.²⁹⁶ The Air Force signed the Early Transfer Deed on July 1, 1997.²⁹⁷ The quitclaim deed included covenants restricting the use of groundwater for human consumption unless certified by the Indiana Department of Environmental Management; that construction will not disrupt remedial and response actions; and a warranty that cleanup shall occur at the expense of the Air

²⁹² Interview with Derence V. Fivehouse, *supra* note 281.

²⁹³ Interview with Derence V. Fivehouse, *supra* note 281.

²⁹⁴ Cheri L. Peele, *supra* note 274, at 32. "The Air Force submitted a detailed budget request to the Office of Budget and Management for the full cost of investigation and remediation based on a worst case scenario" in compliance with CERCLA §120(h)(C)(II)(IV). *Id.* The State also guaranteed access to the property for the Air Force. *Id.*

²⁹⁵ FOSET, Miami Correctional Facility, Grissom Air Force Base, Ind. (Jun. 24, 1997).

²⁹⁶ Letter from Albert F. Lowas, Jr., Acting Director, AFBCA, to Frank O'Bannon, Governor of Indiana (Jun. 24, 1997). *See also, Text: Agreement Sanctioning First Early Transfer of Contaminated Military* *supra* note 284.

²⁹⁷ ICMA BASE REUSE CONSORTIUM BULLETIN, vol. 2, issue 2, 1 (Jul. 1997). Only the Governor's approval was needed because Grissom AFB was not on the National Priorities List. *Id.* Approval of the transfer was also obtained from the U.S. Department of Justice as it retains the authority to approve the siting of correctional facilities pursuant to 41 C.F.R. §101-47.308.

Force, unless contamination was due to a third party.²⁹⁸ In all, the first DOD and Air Force early transfer of contaminated property was completed in approximately sixty days.²⁹⁹

B. Griffiss Air Force Base.

Situated in a rural community outside Rome, New York, Griffiss Air Force Base was a bomber base comprising of 3,552 acres when it faced both realignment and ultimate closure under two separate rounds authorized by DBRAC-90.³⁰⁰

In August 1997, interest was expressed in the transfer of four parcels totaling 269.3 acres to the Griffiss Local Development Corporation (hereinafter GLDC) by a long-term lease in furtherance of conveyance.³⁰¹ However, the AFBCA learned GLDC was not a state-chartered LRA and therefore was not authorized by DOD to negotiate or accept property transfers.³⁰² Consequently, the Oneida County Industrial Development Agency (hereinafter OCIDA) was appointed by the State of New York and approved by DOD as the LRA.³⁰³

²⁹⁸ FOSET, Miami Correctional Facility, Grissom Air Force Base, Ind. (Jun. 24, 1997).

²⁹⁹ *Id.*

³⁰⁰ Interview with Brent Evans, *supra* note 69. Griffiss Air Force Base was realigned in September 1995 and was closed in September 1998. However, there remains a federal presence on the site consisting of Rome Laboratory, a Defense Finance and Accounting Center, and a Department of Veterans Affairs Hospital. *Id.*

³⁰¹ *Id.* Leasing in furtherance of conveyance provides the LRA with all the indicia of ownership, however the Air Force effectively loses control of the property in that it is unable to monitor the daily activities of the LRA or any sub-lessees. *Id.* For example, if GDLC is the lessee and a sub-lessee spills contaminants or hazardous waste at the site during the term of the lease, the GDLC and the sub-lessee should be responsible for the cleanup, thus honoring its agreement to indemnify and hold harmless the Air Force. *Id.* However, if the GDLC does not have the financial resources needed for the cleanup, then it may not cleanup the site. *Id.* Ultimately, as the landlord of the property, the Air Force becomes responsible for the cleanup. *Id.*

³⁰² *Id.* GDLC had no assets and no authority to tax and was therefore considered judgment proof if they failed to adhere to their environmental cleanup obligations if additional contamination occurred from its leasing activities. *Id.*

³⁰³ *Id.* OCIDA shared many of the same members of GDLC. *Id.*

In negotiations with OCIDA, it became clear that the county wanted something other than a lease, because it did not want to put its assets at risk to be only a holding entity that subsequently leased the property to the GDLC.³⁰⁴ Instead, the OCIDA wanted a deed.³⁰⁵

Meetings followed among members of AFBCA, the GDLC, the OCIDA, U.S. Environmental Protection Agency, Region II, and the New York State Department of Environmental Conservation and the subject of discussion was the ETD.³⁰⁶ Proponents considered it the perfect mechanism and anticipated completion of the process within three to four months.³⁰⁷ However, the estimate was overly optimistic because the regulatory community was reluctant to endorse the Early Transfer Deed (hereinafter ETD).³⁰⁸

The AFBCA continued to explain to the regulators what the ETD was and to assuage their concerns about environmental contamination: an ETD did not obviate any obligation by the Air Force to cleanup the contaminated property after the transfer.³⁰⁹

The AFBCA also reminded the regulators that in terms of environmental requirements,

³⁰⁴ *Id.*

³⁰⁵ *Id.* The OCIDA benefits from the early transfer deed (hereinafter ETD) for the following reasons: its ability to obtain cheaper financing, to reduce Air Force involvement in daily transactions, to invest in long-term capital improvements, and in attracting long-term tenants and developers because of stable property ownership. *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.* It allayed the Air Force's concerns over liability for third-party contamination and the concerns of OCIDA. Additionally, because the first ETD was completed at Grissom Air Force Base in about 4 months and the basic framework of an ETD was already established, the AFBCA expected a similar timeframe for the property at Griffiss Air Force Base. *Id.*

³⁰⁸ *Id.* It was perceived by AFBCA that the regulators preferred a leasing arrangement rather than an ETD, because of several presumed factors by the regulators, namely, that by (1) restraining Air Force's ability to convey contaminated property by deed, it would encourage the Air Force to remediate the property quicker, when in fact, cleanup schedules are directly impacted by funding, and not by the conveyance method (2) by not conveying the property the Air Force incurs operation and maintenance costs and therefore the Air Force would expedite cleanup in order to reduce those costs, when in fact, the Air Force passes those costs when it leases property and (3) they would lose oversight or control over the Air Force's cleanup actions.

Id.

³⁰⁹ *Id.*

there are no differences to the Air Force between leasing or deeding property.³¹⁰ The AFBCA also emphasized that the transferee received an additional assurance from the Air Force, that it would seek funding from the Office of Management and Budget, that is not present in a leasing arrangement, and how the cleanup schedule is not affected by the conveyance instrument, but rather by funding.³¹¹ Lastly, the AFBCA reminded the regulators of the indemnity provision of §330 of NDAA-93.³¹²

The negotiations continued past the first three months. In addition to the mechanics of an ETD, more contentious issues arose concerning petroleum, asbestos, and lead paint contaminated sites or facilities.³¹³ There were significant differences in interpretations of the statute. The environmental regulators wanted assurances from the Air Force covering those forms of pollution, but the AFBCA argued, rightfully, that those media extended beyond the CERCLA §120(h) covenants and were not contemplated for an ETD.³¹⁴

As more months passed, draft documents of the Covenant Deferral Request, the FOSET, and the ETD were reviewed and revised.³¹⁵ Then, in June 1998, U.S. Environmental Protection Agency issued its ETD guidance and the state regulators slowly became supportive of the ETD.³¹⁶ However, they still requested and received a

³¹⁰ *Id.* Under the ETD, like a lease, the Air Force continues to have access to the property, remains obligated to cleanup the property, and continues to impose use restrictions, if necessary. Only after remediation is complete, is a corrective deed issued to the LRA. *Id.*

³¹¹ *Id.*

³¹² NDAA-FY93, Pub. L. No. 104-201, *supra* note 191.

³¹³ Interview with Brent Evans, *supra* note 69.

³¹⁴ *Id.* It was perceived by the AFBCA that the regulators wanted to impose a more expansive interpretation of the statute to cover non-CERCLA issues. The AFBCA made the argument that if the property was not contaminated and lead was in a building then the state environmental regulators could not prevent that transfer of property, so why should contaminated property be treated differently. *Id.*

³¹⁵ *Id.* The FOSET included all the environmental conditions and media of the property, but the CDR was limited to CERCLA contaminants. *Id.*

³¹⁶ *Id.* Delays also were caused by discussions relating to the actual status of sites and technical matters. *Id.*

letter from AFBCA containing assurances that nothing in the ETD process affected or diminished the Air Force's obligations under the Resource Conservation and Recovery Act and the Clean Water Act.³¹⁷ Finally after twenty months of negotiations, the U.S. Environmental Protection Agency, Region II approved the environmental regulatory documents on April 2, 1999.³¹⁸ Concurrently, State of New York Governor, George Pataki approved the Air Force's Covenant Deferral request for one of the four parcels, consisting of 65 acres.³¹⁹ However, the ETD is yet unsigned.³²⁰

C. Mather Air Force Base.

Located on 5,716 acres in the suburbs of Sacramento, California, Mather Air Force Base was closed in September 1993.³²¹ Mather Air Force Base was the home of a bombardment wing, an air refueling group, and navigational training.³²² It was recommended for closure during the 1988 round.³²³ Its military mission terminated in May 1993 and Mather Air Force Base officially closed the following September.³²⁴

Pursuant to the local redevelopment plan the Air Force retained the 26-acre military hospital, and the Army retained 31 acres for the National Guard.³²⁵ Public benefit transfers resulted in 2,883 acres for an airport, 1,462 acres for county parks and

³¹⁷ *Id.*

³¹⁸ Letter from Jeanne M. Fox, Regional Administrator, U.S. Environmental Protection Agency, Region II, to Albert F. Lowas, Director, AFBCA (Apr. 2, 1999).

³¹⁹ *Id.*

³²⁰ Interview with Brent Evans, *supra* note 69. There remains ongoing discussions concerning utility issues. *Id.*

³²¹ *Case Studies on Selected Bases Closed in 1988 and 1991*, *supra* note 274. It is also on the National Priorities List. *Id.* Mather Air Force Base was opened as an Army Air Corps installation in 1918. *Id.*

³²² *Id.* at 75.

³²³ *Id.* at 75.

³²⁴ *Id.* at 76.

³²⁵ *Id.* at 76.

recreation, and 95 acres for educational purposes.³²⁶ Remaining property is slated to be transferred for commercial, industrial, and residential development.

With several potential buyers waiting in the wings for the property, Sacramento County was interested in obtaining by deed the 627.7 acres and 66 facilities that were leased portions of the Economic Development Conveyance property.³²⁷

In 1996, representatives of Sacramento County entered into an Economic Development conveyance with the Air Force for 668 acres and 100 facilities, but were unable to take official ownership of the land because of groundwater and soil contamination in some sections.³²⁸ At that time, the Air Force could not transfer title to property until they could meet the CERCLA covenants at §120(h). However, the passage of CERCLA §120(h)(3), allowing for military property to be transferred before all actions were taken to address contaminants renewed transfer negotiations. This new “early transfer” required a covenant that all required actions would be taken.

The parcels affected comprised a variety of transfer mechanisms.³²⁹ Negotiations to transfer parcel P to the U.S. Department of Education were negatively impacted by a letter addressed to the AFBCA expressing the Department of Education’s policy not to

³²⁶ *Id.* at 76. Approximately 28 acres, including 60 family housing units and 200 single housing units were transferred to the Sacramento Housing and Redevelopment Agency, to provide facilities for the homeless. *Id.* The 174-acre golf course was sold to Sacramento County for \$6 million. *Id.* at 77.

³²⁷ See Finding of Suitability for Early Transfer with a CERCLA §120(h)(3) Covenant Deferral (Dec. 23, 1998). Parcel Uw was the water plant and remaining parcels were commercial in nature. *Id.* at 3.

³²⁸ Pamela Martineau, *Sacramento County Becomes Official Owner of MatherLand*, SACRAMENTO BEE, Dec. 31, 1998, at B4.

³²⁹ The parcels included: I (e.g. chapel) and Ut (e.g. telephone and gas) for conveyance by public sale; M for assignment to the U.S. Housing Urban Development and parcel P for assignment to the U.S. Department of Education for subsequent public benefit conveyances to the County of Sacramento and the Sacramento County Office of Education, respectively; and parcel Q (e.g. credit union) for conveyance by negotiated sale, and last the EDC parcel. See Finding of Suitability for Early Transfer with a CERCLA §120(h)(3) Covenant Deferral (Dec. 23, 1998), DOD BRIM, *supra* note 50.

accept contaminated property.³³⁰ Consequently, as of June 25, 1999, negotiations with the U.S. Department of Education have temporarily halted, but are expected to continue in the near future.

Negotiations for the 627.7 acres were also affected by concerns over lead-based paint particularly at and around World War II-era buildings. Regulators from the U.S. Environmental Protection Agency, Region IX and the California Toxic Substances and Control Board were insisting on sampling and testing soil around the buildings for lead contaminants. Representatives of AFBCA resisted that request because at the national level, the DOD and U.S. Environmental Protection Agency were developing a joint lead-based paint policy.³³¹ Additionally, since the property had already been leased long-term to Sacramento County who then sub-leased it to various tenants, it was AFBCA's position that the regulators should be discussing sampling with Sacramento County.³³²

Undeterred, the U.S. Environmental Protection Agency, Region IX performed a drip-line test and demanded a health risk assessment.³³³ AFBCA, in turn, asserted that the leases (and any future deeds) contained restrictions limiting use of the property to activities that do not involve children younger than seven years thus protecting children at risk for lead poisoning.³³⁴

On November 9, 1998, the Air Force published public notice of the pending transfers and responded to all public comments received during the 30-day review

³³⁰ Letter from David B. Hakola, Dir., Real Property Group, U.S. Dep't of Education, to John J. Corradetti, Jr. Program Manager, AFBCA (Jun. 15, 1999). It would not accept a FOSET. *Id.*

³³¹ Telephone Interview with Sam R. Rupe, Ass't Chief Counsel, AFBCA, Arlington, Va. (Jun. 21, 1999). AFBCA did not want to preempt a policy being worked at the national level. *Id.*

³³² *Id.*

³³³ *Id.* A drip-test measures lead contaminants from samples removed from the ground at the point roof run-off would hit the ground. *Id.*

³³⁴ *Id.* AFBCA also questioned the testing methodology. *Id.*

period.³³⁵ On December 29, 1998, California State Governor Pete Wilson Parcels determined that the property was suitable for transfer.³³⁶ The U.S. Environmental Protection Agency, Region IX had made its independent determination that the property was suitable for early transfer on the proceeding day.³³⁷

D. Lowry Air Force Base.

Closed in September 1994, the 1,866 acres of Lowry Air Force Base was highly desired for redevelopment due to its location partially in Denver, Colorado and partially in the suburb of Aurora.³³⁸ The approved local redevelopment plan provided for business, education, recreation and residential uses.³³⁹

A not-for-profit organization, Bonfils Blood Center, [hereinafter BBC], that provides blood, blood products and transfusion medicine services throughout Colorado, initially leased 11.523 acres (including the formerly used base commissary) on July 14, 1995.³⁴⁰ BBC then performed extensive modifications to the existing building to support its operations.

³³⁵ Letter from Pete Wilson, Governor, State of California, to Albert F. Lowas, Jr. Director, AFBCA (Dec. 29, 1998).

³³⁶ *Id.*

³³⁷ *Id.* Notwithstanding the approval of the covenant deferral request, the State of California maintained its authority to require "any remedial or removal action by any appropriate party (including transferee(s)) if information obtained in the future from any source indicates that the Air Force or another appropriate party is responsible for such action." *Id.* The deferral request was supported by a FOSET, a Supplemental EBS, and an Environmental Response Obligations Addendum, pursuant to CERCLA §120(h)(C)(3). *Id.*

³³⁸ *Case Studies on Selected Bases Closed in 1988 and 1991*, *supra* note 274, at 73.

³³⁹ *Case Studies on Selected Bases Closed in 1988 and 1991*, *supra* note 274, at 73. The DOD retained 115 acres for the Defense Finance and Accounting Center and an Air Reserve personnel center. An educational public benefit transfer conveyed 220 acres to a consortium of Colorado colleges and the Denver public school system and about 175 acres were transferred for parks and recreation public benefit transfers. In 1995, an economic development transfer conveyed 711 acres to the Lowry Economic Redevelopment Authority which replaced the Lowry Economic Recovery Project in 1994. ICMA BASE REUSE CONSORTIUM BULLETIN, vol 3, issue 2, 3 (Mar/Apr 1998).

³⁴⁰ FOSET, Bonfils Blood Center, Lowry Air Force Base (Apr. 1, 1999).

In 1997, BBC expressed interest in receiving 11.523 acres under a health-related public benefit transfer.³⁴¹ Initial consideration was given to leasing the parcel from the AFBCA through the U.S. Department of Health and Human Services, as the sponsoring agency (hereinafter HHS) to BBC.³⁴² However, the HHS was unwilling to accept a leasing arrangement since it neither had the funds, the technical expertise, nor the experience in handling environmental contamination.³⁴³ An alternative option considered was for AFBCA to lease the property directly to BBC, but it proved problematic to the Air Force because of BBC's lack of assets and lack of experience in handling environmental oversight.³⁴⁴

Concurrent to opening discussions between BBC and AFBCA, the Governor of Colorado was preparing to issue an Executive Order describing the criteria required for the evaluation and approval of early transfers of contaminated federal property at non-NPL sites. The Executive Order was signed on June 18, 1998 and it required the Colorado Department of Public Health and Environment (hereinafter CDPHE) to evaluate such requests and provide recommendations to the Governor.³⁴⁵

Having completed three earlier ETDs at other bases, the AFBCA proposed transferring the more than 11 acres to BBC by an ETD.³⁴⁶ Such a transfer was viewed as mutually beneficial; BBC would benefit from its ability to realize reduced finance

³⁴¹ Interview with Derence V. Fivehouse, *supra* note 281.

³⁴² *Id.*

³⁴³ *Id.* There was a groundwater trichloroethene plume migrating off-base, along with other contaminated sites. *Id.*

³⁴⁴ *Id.*

³⁴⁵ State of Colorado Executive Order D013-98, (Jun. 18, 1998). It stated that "where there is a reasonable expectation of exposure risks to humans or biota at unacceptable levels, such sites will not be considered as appropriate candidates for transfer. In addition, where the nature and extent of potential contamination is unknown, the risks are not assessed, and/or the proposed reuse has not been identified, transfer is inappropriate. *Id.*

³⁴⁶ Interview with Derence V. Fivehouse, *supra* note 281.

charges on its investment loans if it held title to the property and the AFBCA would benefit from reducing its operation and maintenance costs.

Negotiations were progressing for the ETD until discord arose over the issue of alleged health risks from a trichloroethene plume that traveled underground past the occupied building.³⁴⁷ Fueling this issue was the fact that the Air Force had previously inserted corrective vents in off-base housing to allay concerns over indoor air pollution because of the plume. This action motivated BBC to seek corrective remedies at its site.³⁴⁸ The AFBCA subsequently performed indoor air testing at base housing to reassure BBC and the test results were lower than those from off-base testing, but BBC was not convinced that there was no health risk.³⁴⁹

BBC demanded testing at its building and tests were conducted in November 1997.³⁵⁰ The sampling was considered dubious because the samples were conducted while the building's heating and ventilation system was operating so as to not reflect potential indoor-air exposure risks.³⁵¹ In response to that concern, the Air Force conducted a second set of samples in October 1998 with the heating and ventilation system off.³⁵² Those results equated to the Occupational Safety and Health Administration's standard of no risk.³⁵³ Nevertheless, BBC was dissatisfied and insisted on continuous air monitoring at its proposed site.³⁵⁴ After seeking CDPHE's opinion on

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ FOSET, *supra* note 340.

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ Interview with Derence V. Fivehouse, *supra* note 281.

the alleged health risk, the AFBCA denied BBC's request.³⁵⁵ The Air Force reviewed the health risk assessment derived from the second air test and then reviewed the trichloroethene plume's monitoring well measurements (upgrade from the building) and confirmed no significant change had occurred.³⁵⁶ Documents were prepared for the signature of the Governor of Colorado but were not sent in April 1999 because of the stalemate concerning indoor air at the property leased by BBC.³⁵⁷ Consequently the property remained under a 25-year interim lease.³⁵⁸

A degree of rapprochement occurred in early July 1999 with a telephone call from BBC's attorneys.³⁵⁹ During renewed discussions, BBC proposed conducting another indoor air sampling and health risk assessment at BBC's expense and if the results were greater than one in one million the Air Force would investigate and take necessary response actions that may include subslab exhaust system/ventilation and air monitoring.³⁶⁰ The AFBCA counter-proposed that annual monitoring be conducted by BBC in the common areas of the building with the heating and ventilation system on and that the results be entered into the CDPHE's health risk model and if there are significant changes then corrective measures will be negotiated.³⁶¹ As of July 16, 1999, the AFBCA was preparing draft language for its proposal and accompanying agreement (which would also need to be approved by the CDPHE).³⁶²

VII. Conclusion.

³⁵⁵ *Id.* The CDPHE conducted its risk analysis and its results indicated no unacceptable exposure risk to humans or biota for current or potential future use scenarios. FOSET, *supra* note 340.

³⁵⁶ *Id.*

³⁵⁷ Interview with Derence V. Fivehouse, General Counsel, AFBCA, at Arlington, Va. (Jul. 16, 1999).

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² *Id.*

After reviewing 10 U.S.C. §2687 and the subsequent dissatisfaction with the “behind the scenes” machinations of the DOD, the “smarter” legislation was passed by the Base Realignment and Closure Act of 1988 and the Defense Realignment and Closure Act of 1990.

The later statutes were more responsive to public outcries for more oversight of DOD actions, of a need for a more apolitical decisionmaking process, and the establishment of more objective selection criteria. The progression from DOD unilateral decisionmaking to a Base Closure Commission with extensive oversight, review and decisionmaking authority sheds light on the process and promotes a neutral process. However, even the best attempts to isolate a major federal action from political taint or unfair influence can go awry. For many, the memory is still too fresh of promises made by the White House to save jobs at McClellan Air Force Base in Sacramento, California during a political campaign trip. This action was perceived by many as interfering with the independent decisionmaking process of the Base closure Commission. Notwithstanding that incident, enormous strides have been taken in the last decade to overcome perceived deficiencies, mismanagement, or ignorance about the base closure process.

Through review of subsequent legislation it is evident that in the early years of base closures, DOD, state and local governments, and local communities were unclear about how the process would actually work and the long term effect of closures on the parties involved. Lobbying against closure may have been the first priority of communities and local political entities. However, once the decision was made, efforts then turned to seeking the speedy transfer of “clean” property from the DOD. In that

transitional stage, the demands of environmental laws and regulations became evident. Land transfers were increasingly delayed to allow for investigation, remediation, or in some cases negotiations. At this critical juncture, competing interests surfaced. Understandably, local communities and local governments were seeking speedy transfers of real and personal property in hopes of selling or leasing it to developers. Their focus was adding businesses to their tax rolls, jobs for their citizens, and new housing. Besides the pace of land transfers, many committees were seeking a break on the fair market value of the property from DOD. Lastly, they wanted land clean from contamination without worrying about future liabilities. In contrast, DOD, was and is seeking to quickly divest itself of property. DOD wants to downsize, it wants to reduce its infrastructure - bottom-line it wants to save money and receive a return for its dollar. Thrown into this mix are politicians and environmental regulators.

It is not surprising that those competing interests have required changes to the process. Moreover, they even have delayed land transfers and demanded long-term DOD involvement. Consider that Pease Air Force Base, New Hampshire was closed in 1991, yet DOD is still active in the oversight of that closed installation. I believe such long-term involvement was not DOD's intent when base closures were initiated.

Perhaps environmental issues were underestimated in the formula for closure, but whatever the reason, contamination at closure sites has been a deal breaker for land transfers. There has been, and I suspect there will continue to be, a lack of federal dollars to fully cleanup all closure sites to background levels. Less idealistic and more realistic efforts must be undertaken to balance risks to human health and the environment and efforts to redevelop the properties. The establishment of Early Transfers by Deed has

established a middle-ground between the desire for a clean property and the desire for a speedy transfer of property. However, as demonstrated by the case studies discussed within this paper, it too has its critics. It is not a magical solution as evidenced by the degree of wariness, distrust, reluctance, and misunderstandings that occurred in the three finalized deeds and ongoing talks on the fourth. It does demonstrate that a multi-tiered approach may be the solution.

Deeds containing the reassurances for cleanup by DOD allow for redevelopment, but local government and communities must make a concerted effort to protect their investment by clearly establishing zoning ordinances that conform to the level of cleanup completed based on risk assessments. Secondly, they must have an effective enforcement mechanism in place to ensure land use restrictions are not violated. DOD oversight of the property will not be as effective as local oversight. For example, an out-of-town "landlord" can only rely on what he may hear, but a local "landlord" has firsthand knowledge of the condition of the property. Since environmental enforcement rests primarily with state and federal regulators, a separate arrangement should be made between the local government (as the new property owner) and the regulators identifying a schedule for inspections or granting access rights to the property to confirm compliance with land use restrictions.

Alternatively, legislation providing for state enforcement for sites that are not under enforcement orders may be needed. State environmental protection offices have no free-standing authority to enforce use restrictions, they are primarily a function of zoning laws and property laws of the state. Since early transfers require land use restriction and an increased scrutiny for environmental compliance, perhaps new enforcement law is

needed. The model language for early transfers of deeds does not provide for access to the property by the state environmental office.

Another proposed change in my opinion is a more clearly defined objective for base closures and realignments. The succession of laws has, to me, shifted focus from saving DOD money and rapid divestment of DOD property to that of minimizing the financial blow to the local communities. Real and personal property is increasingly transferred at less than full market value, based on the transfer mechanisms described in section E. of this paper. Secretary of Defense William S. Cohen's announcement that "the DOD will ask Congress for the authority to transfer former base property to local communities at no cost if they use it for job-generating economic development" reinforces this belief.³⁶³

Another proposed change is a two-prong approach to prioritize cleanup priorities. One prong is to emphasize cleanup at sites that pose an immediate cleanup risk and the second prong is to interface that list with cleanup of sites in areas with high redevelopment potential. Use the limited dollars where the return is greater.

Another layer for the tiered approach is to establish a local business or "homeowners'" association. It can be modeled after associations currently in place at various residential neighborhoods. The association may establish another mechanism for overseeing and protecting land use restrictions at transferred property. With vested interests in maintaining a safe environment, association members could establish rules governing activities on the premises and then include penalties or enforcement provision.

³⁶³ *Plan Made to Speed Community Reuse of Former Military Base* (visited Jun. 4, 1999) http://www.defenselink.mil/news/Apr1999/b04211999_bt189-99.html>. This new policy of no-cost Economic Development Conveyances is expected to minimize the need for time-consuming property

They also may quickly recognize a problem area and notify the proper authorities and environmental regulators.

Lastly and more importantly, if Congress and the american public are sincere with their desires to return closed installations to clean status, then Congress must authorize and appropriate more money. Limited funding requires limited actions. Citizens must lobby their Congressmen for the money necessary to clean the contaminated sites to a level that reassures them against future health risks.

There is no simple solution but learning from past mistakes and building upon present practices is promising. Reasonable men must prevail to allow practical, realistic objectives be met with limited funds and technology.

appraisals that delay transfers. The end result is expected to be substantial savings to the DOD because of reduced maintenance and administrative oversight costs. *Id.*